


11-1-2010

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Recommended Citation

Matthew R. Farley, *Challenging Supremacy: Virginia's Response to the Patient Protection and Affordable Care Act*, 45 U. Rich. L. Rev. 37 (2010).

Available at: <https://scholarship.richmond.edu/lawreview/vol45/iss1/4>

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CHALLENGING SUPREMACY: VIRGINIA'S RESPONSE TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

*Matthew R. Farley **

I. INTRODUCTION

Health care reform has been a primary goal of presidential candidates for the past half-century. At least since the adoption of the Universal Declaration of Human Rights in 1948¹ and the inception of the Medicare system in 1965,² the primacy of achieving extensive and efficient health care in American policymaking cannot be seriously disputed.³ Currently, health care costs seem uncontrollable, and nearly fifty million Americans remain uninsured.⁴ Continuing into modern times, a cornerstone of President Bill Clinton's first term in office was to provide health care for all Americans.⁵ And although Democrats held a majority of seats in

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1. G.A. Res. 217 (III) A, art. 25, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948), *available at* http://www.un.org/events/humanrights/2007/hrphotos/declaration%20_eng.pdf (establishing a fundamental human right to a standard of living adequate for health and well-being).

2. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended in scattered sections of U.S.C.).

3. More strikingly, efforts to realize universal health care coverage in the United States can be traced as far back as 1912, when Theodore Roosevelt campaigned on a platform of health insurance for industry workers. *See* KAISER FAMILY FOUND., NATIONAL HEALTH INSURANCE—A BRIEF HISTORY OF REFORM EFFORTS IN THE U.S. 1 (2009) [hereinafter HISTORY OF REFORM], *available at* <http://www.kff.org/healthreform/upload/7871.pdf> (“[A]s early as 1915, Progressive reformers ineffectively campaigned in eight states for a state-based system of compulsory health insurance.”).

4. CARMEN DENAVAS-WALT ET AL., U.S. DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008 20, 22 (U.S. Census Bureau 2009), *available at* <http://www.census.gov/prod/2009pubs/p60-236.pdf>.

5. *See generally* Health Security Act of 1993, H.R. 3600, 103d Cong. (1993) (“A bill [t]o ensure individual and family security through health care coverage for all Americans.

both chambers of Congress at the time, Clinton's attempt to revamp the health care system failed remarkably.⁶

Comprehensive health care reform in the United States was not seriously considered again until Barack Obama's election in 2008. President Obama vowed to focus on comprehensive health care reform during his first year in office.⁷ Despite having both chambers of Congress on their side once again,⁸ Democrats experienced significant legislative setbacks throughout 2009 and early 2010.⁹ Ultimately, however, the Patient Protection and Affordable Care Act ("PPACA") was signed into law on March 23, 2010,¹⁰ defeating sturdy opposition in both chambers.¹¹

Despite the success of the congressional reform effort, a debate about health care rages on in America. The debate centers on questions about who should have access to health care and on what terms, about the quality of acceptable health care, and about the cost and sustainability of health care.¹² Many times the debate is reduced to ideological extremes, asking, for instance, whether there is a fundamental right to health care at all.¹³ Perhaps the most divisive issue is the proper role of government—

..."); see also HISTORY OF REFORM, *supra* note 3, at 7–8.

6. See Jonathan Oberlander, *Learning From Failure in Health Care Reform*, 357 NEW ENG. J. MED. 1677, 1677 (2007). The failure of the Clinton health care plan resulted in landslide victories for Republicans in the 1994 midterm elections. This "Republican revolution" gave the GOP control of both the House of Representatives and the United States Senate for the first time since Eisenhower's tenure. See Andrea Stone, *Republican Revolution Fades*, USA TODAY, Jan. 20, 2003, at A4.

7. See Roger Simon, Editorial, *The Legendary Rahm Emanuel*, CHI. SUN-TIMES, June 28, 2009, at A29.

8. OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, *Congressional Profile*, http://clerk.house.gov/member_info/cong.html (last visited Oct. 30, 2010) (During the 111th Congress, Democrats controlled the House of Representatives 255 to 178 and the Senate 57 to 41.).

9. See, e.g., Janet Hook & Noam N. Levey, *Health Care: Heat on Pelosi, Obama*, CHI. TRIB., Mar. 8, 2010, at C11; Jeff Zeleny, *A Failure to Communicate or the Wrong Message?*, N.Y. TIMES, Jan. 27, 2010, at A17.

10. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010) (amended 2010) (codified as amended in scattered sections of the U.S.C.).

11. Janet Hook & Noam N. Levey, *Health Care: Heat on Pelosi, Obama*, CHI. TRIB., Mar. 8, 2010, at C11.

12. See generally Noam N. Levey & Tom Hamburger, *Supporters to Tout Health Law*, CHI. TRIB., Aug. 27, 2010, at C15; Kevin Sack, *Health Care Wastefulness Is Detailed in Studies*, N.Y. TIMES, Sept. 7, 2010, at A15; Duff Wilson, *Vein Study Gets a Rare Challenge*, N.Y. TIMES, Sept. 23, 2010, at B1.

13. See, e.g., CAROLYN L. ENGELHARD & ARTHUR GARSON, JR., *THE RIGHT TO HEALTH CARE AND THE ROLE OF GOVERNMENT IN HEALTH POLICY* (2008), available at <http://www.healthsystem.virginia.edu/internet/phs/news/docs/mcbriefingfinal.pdf>.

particularly the federal government—in administering whatever answers are reached on other issues of health care concern.¹⁴

This wide disparity of thinking about the federal government's proper role became immediately apparent as both chambers of Congress worked to pass health care reform legislation in the eleventh hour of 2009.¹⁵ Both the House bill¹⁶ and Senate bill¹⁷ faced rigorous debate and constitutional challenge from congressional conservatives on the floors of their respective houses.¹⁸ In addition, thirteen state attorneys general entered the fray, announcing they would file a lawsuit if the then-proposed reform efforts succeeded.¹⁹ The state attorneys general objected specifically to the so-called “Nebraska compromise” and similar provisions in the Senate bill, as well as the funding mechanism, or “individual mandate,” contained in both bills.²⁰ According to those state cri-

14. See 155 CONG. REC. H12591-94 (daily ed. Nov. 7, 2009); Ross Douthat, Op-Ed, *Let's Make a Deal*, N.Y. TIMES, Feb. 15, 2010, at A21 (“The right seeks a functioning marketplace in health care, subsidized but not micromanaged by the government. However many small steps the Democratic legislation takes in that direction, its biggest step goes miles the other way—toward a world where consumers are required to buy a particular kind of health insurance, insurers are required to sell it to them, and the cost of health care gets held down, ultimately, by price controls and bureaucratic supervision.”).

15. See Robert Pear, *Senate Approves Health Care Bill in Party-Line Vote*, N.Y. TIMES, Dec. 25, 2009, at A1; Dana Bash et al., *House Passes Health Care Reform Bill*, CNN (Nov. 8, 2009, 5:40 AM), <http://www.cnn.com/2009/POLITICS/11/07/health.care/index.html>.

16. Affordable Health Care for America Act, H.R. 3962, 111th Cong. (1st Sess. 2009).

17. Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2nd Sess. 2009).

18. See, e.g., 155 CONG. REC. H12048 (daily ed. Oct. 29, 2009) (statement of Rep. Ted Poe); Press Release, Senator Orrin G. Hatch, Hatch Speaks Out Again on Constitutionality of Health Care Reform Bill (Dec. 11, 2009), http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=8028d1d2-1b78-be3e-e01f-efc1c9ea2128&Month=12&Year=2009.

19. Letter from Henry McMaster, Attorney General of S.C., et al. to Nancy Pelosi, Speaker of the U.S. House of Representatives, and Harry Reid, Majority Leader, U.S. Senate (Dec. 30, 2009), available at <http://www.attorneygeneral.gov/uploadedFiles/Press/Health%20Care%20provision%20letter.pdf>; see also Debbie Elliott, *State Attorneys General Question Health Care Bill*, NPR (Dec. 25, 2009), <http://www.npr.org/templates/story/story.php?storyId=121869650>.

20. Letter from Henry McMaster to Nancy Pelosi and Harry Reid, *supra* note 19. The Nebraska Compromise exempts Nebraska from paying its share of the cost of Medicaid. *Id.* Instead, the federal government would permanently fund Medicaid expansions in the Senate bill, which will cost an estimate \$100 million over ten years. Meg Kinnard, *GOP Officials Demand Change in Health Bill*, WASH. POST, Jan. 1, 2010, at A6.

tics, both features of the federal bills overstepped Congress's power as a lawmaking body of limited authority.²¹

Virginia, led by its then-Attorney General Bill Mims, was among the thirteen states threatening a legal challenge to federal reform efforts.²² At the outset of the 2010 Session, the Virginia General Assembly was considering multiple state health care bills which purported to nullify or detract from the federal proposals.²³ And once the new McDonnell administration took its seat in the Commonwealth, the reactionary fight was renewed with vigor.²⁴ Attorney General Ken Cuccinelli became the most pronounced dissident of reform in Virginia, challenging both the substance and process of the federal legislation directly.²⁵ It became increasingly clear that conflict was inevitable. This projection was realized when Attorney General Cuccinelli filed suit against the federal government in the wake of the passage of the PPACA.²⁶

Part II of this article summarizes essential provisions of the PPACA and discusses aspects of its passage in greater detail. Part III details the various measures that Virginia undertook in response to the federal efforts, and evaluates the efficacy and intent of those measures. Also in Part III, constitutional challenges to the PPACA—many of which are raised in Attorney General Cuccinelli's lawsuit on behalf of Virginia—are considered in greater detail. Part IV reflects on some additional hurdles health care may face in the future, and Part V concludes.

21. See, e.g., Letter from Greg Abbott, Attorney General of Tex., to Kay Bailey Hutchison and John Cornyn, U.S. Senators (Jan. 5, 2010), available at http://burgess.house.gov/UploadedFiles/1-5-2010_-_Abbott_Letter_to_Hutchison_and_Cornyn_on_health_bill.pdf.

22. See Letter from Henry McMaster to Nancy Pelosi and Harry Reid, *supra* note 19; see also *13 Attorneys General Threaten Suit over Health Care*, ROANOKE TIMES, Dec. 30, 2009, available at <http://www.roanoke.com/news/breaking/wb/231386>.

23. See *infra* notes 106–46 and accompanying text.

24. See, e.g., Peter Slevin & Rosalind S. Helderman, *GOP State Leaders Say They'll Fight Health-Care Legislation*, WASH. POST, Mar. 23, 2010, at A8.

25. See Jim Nolan, *Cuccinelli Says Virginia Will Sue Over Health-Care Bill*, RICH. TIMES-DISPATCH, Mar. 22, 2010, at A1.

26. See Complaint for Declaratory and Injunctive Relief, *Virginia ex rel. Cuccinelli v. Sebelius*, No. 3:10CV188 (E.D. Va. Mar. 23, 2010) [hereinafter *Virginia Complaint*], ECF No. 1.

II. THE FEDERAL HEALTH CARE BILL

A. *Passage*

The PPACA followed a legislative path riddled with difficulty. In late summer 2009, public outcry at town hall meetings across the country diminished initial reform momentum.²⁷ The public was deeply divided, and many avidly opposed the reform effort.²⁸ Remarkably, in response, President Obama addressed a joint session of Congress in September to regroup his supporters and garner further support from the American public.²⁹ Finally, on November 7, 2009, the House of Representatives successfully passed the Affordable Health Care for America Act (“House bill”) by a narrow 220 to 215 vote.³⁰ However, the Senate did not debate or vote on the House bill; instead, it developed its own bill, which contained many provisions parallel to the House version.³¹ By acting in this way, the Senate made clear that further revisions and negotiations with House lawmakers would be necessary. On Christmas Eve 2009, the Senate passed its bill on a strict party-line vote, 60 to 39.³²

In the early months of 2010, President Obama’s prospects for health care reform were crippled more deeply than ever before. Seemingly in direct response to the advancing health care reform legislation, for the first time since 1972, voters in Massachusetts elected a Republican—Scott Brown—to represent them in the United States Senate.³³ The Republican victory had resounding effects: not only did the Massachusetts special election break the

27. *Town Hall Meeting on Health Care Turns Ugly*, CNN (Aug. 18, 2009, 10:53 AM), <http://www.cnn.com/2009/POLITICS/08/07/health.care.scuffles/index.html>.

28. *Id.*

29. Barack H. Obama, President of the U.S., Address Before a Joint Session of the Congress on Health Care Reform, in 2009 DAILY. COMP. PRES. DOC. 693 (Sept. 9, 2009); see also David S. Broder, Editorial, *Obama’s Easier Path*, WASH. POST, Sept. 13, 2009, at A25.

30. See 155 CONG. REC. H12967–68 (daily ed. Nov. 7, 2009) (House roll call 887).

31. See John Fritze, *In Senate, Health Bill Has Major Hurdles*, USA TODAY, Nov. 9, 2009, at A1 (quoting Senator Lindsey Graham’s comment that “The House bill is dead on arrival in the Senate.”); Kristin Jensen & Laura Litvan, *Two Chambers, Two Bills*, NEWSDAY, Dec. 21, 2009, at A2 (comparing the provisions of the House and Senate bills).

32. See 155 CONG. REC. S13891 (daily ed. Dec. 24, 2009) (Senate roll call 396).

33. See James E. Campbell, *Democrats Must Heed Message of Massachusetts Voters*, BUFFALO NEWS, Jan. 31, 2010, at G2. Brown made a campaign promise to be the forty-first vote against the Senate Bill. See SCOTT BROWN, *Issues*, BROWN FOR U.S. SENATE, <http://www.brownforussenate.com/issues> (last visited Oct. 30, 2010).

Democrats' filibuster-proof Senate majority;³⁴ it also evoked a profound response from conservative leaders across the country.³⁵ Health care proposals that were once barreling forward in Congress were instantly thrust into a state of limbo.

Of course, despite many voices of dissent and numerous delays, Congress ultimately passed comprehensive health care reform of an unparalleled breadth in March 2010.³⁶ Congressional Democrats united and pursued the most viable option in the wake of Scott Brown's election to the Senate: they ushered the Senate bill through the House of Representatives, and then passed amendments to it with a later bill using the reconciliation process.³⁷ Scott Brown's vote, which most likely would have secured a Republican filibuster in the Senate,³⁸ was effectively circumvented.³⁹ After overcoming a final difficulty posed by a handful of pro-life House Democrats,⁴⁰ the health care reform package passed the House 219 to 212,⁴¹ and it was signed into law by president Obama two days later.⁴²

34. See Jim Acosta et al., *Brown Wins Massachusetts Senate Race*, CNN (Jan. 19, 2010, 10:39 PM), <http://www.cnn.com/2010/POLITICS/01/19/massachusetts.senate/index.html>.

35. See, e.g., Matt Viser, *It's All Scott Brown on Capitol Hill*, BOSTON GLOBE, Jan. 22, 2010, at B1 (providing comments of Senators John McCain and Mitch McConnell); Robert F. McDonnell, Governor, Commonwealth of Va., Response to State of the Union Address (Jan. 27, 2010), available at http://sotureponse.com/SOTUResponse/comments/state_of_the_union_response_full_text.

36. See 156 CONG. REC. S1821–S1822 (daily ed. Mar. 23, 2010) (56 to 40 Senate vote).

37. See generally David M. Herszenhorn & Robert Pear, *Democrats Rally to Obama's Call for Health Vote*, N.Y. TIMES, Mar. 21, 2010, at A1.

38. See David S. Broder, Editorial, *A Vote of No Confidence*, WASH. POST, Jan. 21, 2010, at A21.

39. See Harold Meyerson, Editorial, *Finally, Democrats Govern*, WASH. POST, Mar. 24, 2010, at A17.

40. See Kathleen Parker, Editorial, *Hiding Behind Hyde*, WASH. POST, Mar. 28, 2010, at A13 (detailing the concerns of pro-life Democrat Representatives and the resolution struck by those Representatives and the President). The opposition of Representative Bart Stupak and several other pro-life Democrats was assuaged by an Executive Order, which ensured consistency with the Hyde Amendment and implemented restrictions on abortion funding in the PPACA. See Exec. Order No. 13,535, 75 Fed. Reg. 15,599-600 (Mar. 29, 2010).

41. 156 CONG. REC. H2152-53 (daily ed. Mar. 21, 2010) (House roll call 165).

42. PPACA, Pub. L. No. 111-148, 124 Stat. 119 (2010) (amended 2010) (codified as amended in scattered sections of U.S.C.); see also Carolyn Lochhead, *Obama Signs Health Care Reform into Law*, S.F. CHRON., Mar. 24, 2010, at A1.

B. Provisions

The overarching goal of the PPACA is to expand access to affordable health care for all American citizens and legal residents.⁴³ The approach embodied in the legislation is complex, including the creation of health benefit exchanges⁴⁴ and cost-sharing schemes,⁴⁵ and changes to taxes and fees connected to health care and health insurance services.⁴⁶ Additionally, the imposition of a mandate requiring all citizens and legal residents to obtain acceptable health coverage is absolutely necessary to ensure every American can afford health insurance under the PPACA.⁴⁷

1. Modification of Public Programs

The PPACA significantly expands Medicaid benefits. Under the new health care law, all eligible individuals under the age of sixty-five with an income exceeding 133%, but not exceeding 200%, of the federal poverty level will be guaranteed health coverage that meets or exceeds that which is available through the health exchanges.⁴⁸ This expansion means that an estimated sixteen million additional low-income individuals will qualify for Medicaid.⁴⁹

43. See U.S. DEPT OF HEALTH & HUMAN SERVS., IN FOCUS: HEALTH DISPARITIES AND THE AFFORDABLE CARE ACT, <http://www.healthcare.gov/law/infocus/disparities/index.html> (last visited Oct. 30, 2010) (stating that the PPACA will rein in insurance abuses, cap premiums and prohibit denial of coverage, and make health insurance affordable for middle class Americans, among other things).

44. PPACA, Pub. L. No. 111-148, §§ 1311–1313, 124 Stat. 119, 173–85 (2010) (to be codified at 42 U.S.C. §§ 18031–33).

45. *Id.* §§ 1401–1421, 124 Stat. at 213–42 (to be codified as amended in scattered sections of 26 and 42 U.S.C.).

46. *Id.* tit. IX, 124 Stat. at 847–83 (to be codified as amended in scattered sections of 26 and 42 U.S.C.).

47. See Linda J. Blumberg & John Holahan, *The Individual Mandate—An Affordable and Fair Approach to Achieving Universal Coverage*, 361 NEW ENG. J. MED. 6, 7 (2009) (“[R]esearch leaves no doubt that without an individual mandate, many people will remain uninsured.”) (citations omitted).

48. 42 U.S.C.A. § 18051 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)). These figures are currently \$29,327 and \$44,100, respectively, per year for a family of four. See Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. 4199, 4200 (Jan. 23, 2009) (poverty guideline for family of four through Apr. 17, 2010 is \$22,050; multiplied by 1.33 equals \$29,327 annual income; multiplied by 2.00 equals \$44,100).

49. See U.S. CONG., CONG. BUDGET OFFICE, RECONCILIATION PROPOSAL AMENDMENT 9, tbl.4 (Mar. 20, 2010), available at <http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf>. (According to the Congressional Budget Office, the PPACA will reduce the number of uninsured, nonelderly individuals by about thirty-two million, roughly sixteen

In addition, the PPACA requires states to expand Medicaid to encompass adults who are not pregnant starting in 2014.⁵⁰ In order to finance health coverage for the newly eligible individuals, the PPACA provides 100% federal funding for Medicaid from the effective date in 2014 through 2016, a figure that is gradually reduced to no more than 95% beginning in 2017.⁵¹

However, the PPACA received a fair amount of criticism for partially financing its increased Medicaid eligibility with over \$120 billion in cuts to Medicare Part C (Medicare Advantage)⁵² over the next decade.⁵³ While not applicable to basic Medicare, these reductions will reach over ten million seniors enrolled in Medicare Advantage, or roughly twenty-five percent of the senior population.⁵⁴ Critically, these PPACA cuts may pressure private health insurers administering the plans to eliminate supplemental coverage—such as vision and dental insurance—for those enrolled.⁵⁵

An additional alteration to Medicare coverage received less criticism. The PPACA laid plans to eliminate a failing in prescription drug coverage known as the “doughnut hole,” which alludes to the wide disparity in the initial coverage limit and the cata-

million of which will be new enrollees in Medicaid caused by this benefit expansion.)

50. 42 U.S.C.A. § 1396a(10) (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

51. *Id.* § 1396d.

52. Medicare Advantage is the option to receive Medicare benefits through private health insurance plans, which frequently offer lower copayments or supplemental benefits. *See* CENTERS FOR MEDICARE & MEDICAID SERVICES, U.S. DEPT OF HEALTH AND HUMAN SERVS., MEDICARE ADVANTAGE (PART C), <http://www.medicare.gov/navigation/medicare-basics/medicare-benefits/part-c.aspx> (last visited Oct. 30, 2010).

53. *See* 42 U.S.C.A. § 1395w-23(j) (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)); *see also* Press Release, Senator John McCain, Statement by Senator John McCain on the First Republican Amendment to the Health Care Bill (Nov. 30, 2009), http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=47538b18-beb4-65f7-e213-6b8bde316f71&Region_id=&Issue_id= (“[R]eductions include \$120 billion to the Medicare Advantage program, \$150 billion to providers including hospitals, hospice, and nursing homes, and \$23 billion in unspecified decreases . . .”).

54. Phil Galewitz, *Health Insurance Q&A*, L.A. TIMES, Mar. 29, 2010, at E1. *See* KAISER FAMILY FOUND., TOTAL MEDICARE ADVANTAGE (MA) ENROLLMENT, 2010, STATE-HEALTHFACTS, <http://www.statehealthfacts.org/comparetable.jsp?ind=327&cat=6> (last visited Oct. 30, 2010) (listing total MA enrollment at 10,259,669); U.S. CENSUS BUREAU, UNITED STATES, AMERICAN FACTFINDER, <http://www.census.gov/> (follow “American Factfinder” hyperlink; then follow “Fact Sheet” hyperlink) (last visited Oct. 30, 2010).

55. *See* Christy Tinnes & Brigen Winters, *Does the PPACA Apply to Dental and Vision Plans?*, PLANSPONSOR (May 25, 2010), http://www.plansponsor.com/Does_the_PPACA_Aply_to_Dental_and_Vision_Plans.aspx.

strophic threshold under Medicare Part D.⁵⁶ Specifically, the PPACA provides an immediate \$250 rebate to beneficiaries currently in the doughnut hole and completely phases the doughnut hole out by 2020, gradually decreasing the share of cost borne by beneficiaries in the doughnut hole from 100% to 25%.⁵⁷ This benefit will reach nearly four million seniors who are currently paying out-of-pocket for a large portion of their prescription costs due to the Medicare Part D doughnut hole.⁵⁸ The health care reform effort, however, did not address the approaching insolvency of the Medicare program—due to run dry in 2017—as a whole.⁵⁹

2. Health Insurance Exchanges and Individual Subsidies

In order to keep health insurance costs low, the PPACA requires states to create insurance exchanges under the control of federal guidelines.⁶⁰ These “American Health Benefit Exchanges”

56. PPACA, Pub. L. No. 111-148, § 3315, 124 Stat. 119, 479–80 (2010) (amended 2010) (to be codified as amended at 42 U.S.C. § 1395w-102(b)). In other words, the Medicare beneficiary is financially responsible for all prescription drug costs exceeding the initial coverage limit (\$2,830 in 2010) until he has paid a minimum amount out-of-pocket (\$4,550 in 2010), at which point Part D resumes coverage at a ninety-five percent rate. See 42 C.F.R. § 423.104 (2009); Medicare Program, 75 Fed. Reg. 19,678, 19,816 (Apr. 15, 2010) (to be codified at 42 C.F.R. § 423.104); *Fact Sheet Medicare Part D: An Overview*, CAL. HEALTH ADVOCATES, http://www.cahealthadvocates.org/_pdf/facts/D-001-CHAFactSheet.pdf; JACK HOADLEY ET AL., KAISER FAMILY FOUND., MEDICARE PART D SPOTLIGHT: PART D PLAN AVAILABILITY IN 2010 AND KEY CHANGES SINCE 2006 1–2, 11 app. 2 (2009), available at <http://www.kff.org/medicare/upload/7986.pdf>.

57. 42 U.S.C.A. § 1395w-102(b) (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)) (providing that the Secretary shall establish procedures for retroactive reimbursement of Part D eligible individuals); see KAISER FAMILY FOUND., FOCUS ON HEALTH REFORM: SUMMARY OF NEW HEALTH REFORM LAW 12, (2010), available at <http://www.kff.org/healthreform/upload/8061.pdf>.

58. Press Release, U.S. Dep't of Health & Human Servs., Sebelius Announces 1 Million Medicare Beneficiaries Have Received Prescription Drug Cost Relief Under the Affordable Care Act (Aug. 30, 2010), <http://www.hhs.gov/news/press/2010pres/08/20100830c.html>.

59. See John Garven, *Presentation at the Meeting of the Central Ass'n of Health Underwriters* 15 (July 8, 2010), available at http://benico.com/docs/ppaca-impact-on-medical-tourism-7_8_10.pdf. Curiously, however, a website hosted by the Department of Health and Human Services (“DHHS”) mentions the threat of insolvency as a primary motivation for reforming the Medicare system. See U.S. DEP'T OF HEALTH & HUMAN SERVS., AMERICA'S SENIORS AND HEALTH INSURANCE REFORM: PROTECTING COVERAGE AND STRENGTHENING MEDICARE (2009), <http://www.healthreform.gov/reports/seniors/seniorsreport.pdf> (stating that “the threat of Medicare insolvency . . . undermine[s] the health care that the program's beneficiaries need and deserve. Health insurance reform will serve to strengthen the health care that our seniors receive.”).

60. See 42 U.S.C.A. § 18031 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

will make the purchase of health insurance easier for individuals and small businesses with fewer than one hundred employees by establishing clearinghouses for one-stop shopping.⁶¹ Focusing health insurance options in a centralized exchange not only provides individuals with more information and enhances portability of coverage;⁶² it also enables reformation of the insurance market by managing the rules by which insurers are permitted to sell coverage.⁶³ The restrictions imposed on insurers by the PPACA include: eliminating lifetime—and in certain cases annual—limits on the dollar value of coverage,⁶⁴ prohibiting rescission of coverage except in cases of fraud,⁶⁵ eliminating waiting periods for coverage exceeding ninety days,⁶⁶ capping certain deductibles,⁶⁷ requiring extension of dependent coverage to adult children up to age twenty-six,⁶⁸ and prohibiting preexisting exclusions⁶⁹ or ratings for children.⁷⁰ These restrictions on private insurers in the Health Benefit Exchanges will be accompanied by the market entry of a nonprofit competitor, as required by law.⁷¹ And because the law prohibits insurers from offering better rates to customers outside the exchange for plans also offered within them,⁷² in many cases, the restrictions discussed above control the outside market

61. See Pub. L. No. 111-148, §§ 1304(b)(2), 1312, 124 Stat. 119, 171–81 (2010) (to be codified at 42 U.S.C. §§ 18024, 18032); David Balto, MAKING HEALTH CARE COMPETITION WORK 4, CENTER FOR AMERICAN PROGRESS (June 2010), http://www.americanprogress.org/issues/2010/06/pdf/balto_memo.pdf.

62. See *Healthcare Reform*, GIBSON INSURANCE GROUP (2006), <http://www.gibsonins.com/healthcarereform.htm>; Rick Curtis et al., Health Reform: What Legislators Need To Know About Exchanges, National Conference of State Legislatures Webinar 13 (June 2, 2010), available at <http://www.ncsl.org/portals/1/documents/health/Exchangeswebinar60210.pdf>.

63. See generally 42 U.S.C.A. §§300gg, 300gg-3, -7, -11, -12, -14, 18022 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

64. 42 U.S.C.A. § 300gg-11 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

65. *Id.* § 300gg-12.

66. *Id.* § 300gg-7.

67. *Id.* § 18022.

68. *Id.* § 300gg-14.

69. *Id.* § 300gg-3.

70. See *id.* § 300gg.

71. *Id.* § 18054. By critical account, the establishment of a nonprofit competitor in the insurance market is tantamount to the establishment of a public option. See, e.g., ROBERT MOFFITT & KATHRYN NIX, HERITAGE FOUND., THE PUBLIC HEALTH PLAN REINCARNATED: NEW—AND TROUBLING—POWERS FOR OPM 1–6, available at <http://www.heritage.org/Research/Reports/2010/01/The-Public-Health-Plan-Reincarnated-New-and-Troubling-Powers-for-OPM>.

72. See 42 U.S.C.A. § 300gg-94 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

too. Notably, critics of the health care reform package condemn this aspect of the plan for severely undercutting competition by introducing federal standardization.⁷³

Of the twenty-five million individuals the Congressional Budget Office estimates will purchase coverage in the exchanges, about nineteen million are likely to be eligible for financial assistance.⁷⁴ Everyone making less than four times the federal poverty level—\$43,320 for an individual and \$88,200 for a family of four—will receive subsidies and credits under the new law, to be determined on a sliding scale.⁷⁵ This means that individuals making more than 133% and less than 400% of the poverty level will pay somewhere between 2% and 9.5% of their income for insurance, and the government will cover the rest.⁷⁶ Those working for employers who offer health insurance will be eligible for these subsidies too—the new law requires employers to provide a voucher equal to the amount of money they contribute to their offered policy if qualifying employees decide to shop in the exchanges instead.⁷⁷ The Department of Health and Human Services (“DHHS”) will oversee administration of the financial assistance and will require verification of both income and citizenship status.⁷⁸

73. See Robert Moffit, *A Federal Health Insurance Exchange Combined with a Public Plan: The House and Senate Bills*, BACKGROUND, THE HERITAGE FOUND. 1–4, available at http://s3.amazonaws.com/thf_media/2009/pdf/bg2304.pdf. This criticism is not against health exchanges in general, but the specific conception embodied in the reform legislation, where government or non-profit administrators will be active participants in the health insurance market, bargaining aggressively to reduce health care costs and imposing regulatory cost controls. See *id.*

74. See Amy Goldstein, *Insurance Subsidies Prompt Questions of Affordability*, WASH. POST, Mar. 20, 2010, at A4; U.S. CONG., CONG. BUDGET OFFICE, ANALYSIS OF A PROPOSAL TO OFFER A PUBLIC PLAN THROUGH THE NEW HEALTH INSURANCE EXCHANGES 2 (July 22, 2010), available at www.cbo.gov/ftpdocs/116xx/doc11689/Stark_Letter-HR_5808-07-22.pdf.

75. See Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. 4199, 4200 (Jan. 23, 2009) (poverty guideline for an individual is \$10,830, multiplied by four equals \$43,320; poverty guideline for a family of four is \$22,050, multiplied by four equals \$88,200); Goldstein, *supra* note 74. Those making less will get a bigger subsidy and those nearer to the threshold a smaller one. See Goldstein, *supra* note 74.

76. See generally 26 U.S.C.A. § 36B (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

77. See *id.* § 4980H. An employee is eligible if his share of the premium exceeds 9.5% and he makes less than 400% of the federal poverty guideline. *Id.* § 36B.

78. *Id.* § 18081; 42 U.S.C.A. § 18117 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)); see SUMMARY OF NEW HEALTH REFORM LAW, *supra* note 57, at 2.

3. Tax Changes⁷⁹

In order to finance the expanded Medicaid benefits and generous subsidies that the health care law provides, increased revenues are necessary. As mentioned previously, the PPACA imposes an annual tax on individuals without qualifying coverage totaling \$695 per person (capped at \$2085 per family) or 2.5% of household income, whichever is greater.⁸⁰ It also increases the Medicare Part A tax rate by 0.9% for individuals earning over \$200,000 and couples earning over \$250,000, as well as imposes a 3.8% tax on unearned income on these higher-income taxpayers.⁸¹ Further, the PPACA phases in new excise taxes on high-premium insurance plans (those which exceed \$27,500 in annual cost), an initiative that is estimated to generate \$150 billion over ten years.⁸² Finally, health care reform imposes new annual fees on both pharmaceutical manufacturers and private health insurers, totaling \$30.8 billion over ten years (2012 to 2021) for the former, and \$58.8 billion over five years (2014 to 2018) for the latter.⁸³

4. Changes to Private Insurance

The PPACA establishes an immediate temporary high-risk pool to provide coverage for citizens and legal immigrants with pre-existing medical conditions.⁸⁴ Enrollees in the high-risk pool will receive subsidies comparable to cost-sharing currently in place for health savings accounts.⁸⁵ Additionally, the legislation imposes a new process for reviewing increases in premiums, as well as a re-

79. There are more changes to the tax code than those summarized in this section, including, for example, a new tax on tanning salons and multiple limitations and taxes on health savings accounts. *See, e.g.*, 26 U.S.C.A. § 220 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)) (health savings accounts); *id.* § 5000B (tanning services).

80. *Id.* § 5000A.

81. *Id.* § 1411, 3101; *see also* SUMMARY OF NEW HEALTH REFORM LAW, *supra* note 57, at 8.

82. *See* 26 U.S.C.A. § 4980I (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)); U.S. CONG., CONG. BUDGET OFFICE, PATIENT PROTECTION & AFFORDABLE CARE ACT 2, 16 (Nov. 18, 2009), *available at* http://www.cbo.gov/ftpdocs/107xx/doc10731/Reid_letter_11_18_09.pdf.

83. *See* 26 U.S.C.A. § 4001 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)); *id.* § 4001 (private health insurers).

84. *See* 42 U.S.C.A. § 18001 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

85. *Compare id.*, with 26 U.S.C. § 223 (2006) (health savings accounts).

quirement that plans justify all unreasonable increases to state exchanges.⁸⁶ And as mentioned previously, the law contains several other changes to insurance market rules, many of them imposing market regulations and consumer protections.⁸⁷

5. State Role

First and foremost, states are required to erect the exchanges that the PPACA contemplates and oversee the new market regulations and consumer protections.⁸⁸ The legislation also charges states with ensuring the expedient enrollment of new Medicaid beneficiaries and those eligible for subsidies in the exchanges.⁸⁹ The new law also makes grants available to states to establish consumer assistance programs for the benefit of individuals with private coverage.⁹⁰

6. Improving Health Care Efficacy

A number of provisions seek to contain costs and improve the performance of the health system. For instance, the PPACA promises to simplify health insurance administration by requiring uniform operating rules for an array of actions.⁹¹ The PPACA also grants the Food and Drug Administration broader authority to approve generic prescription drugs.⁹² Other provisions include offering states grants to develop alternatives to current tort litigation,⁹³ imposing harsher penalties for submitting false claims,⁹⁴ and increasing funding for anti-fraud activities.⁹⁵

86. See 42 U.S.C.A. § 300gg-94 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

87. See *supra* notes 56–65 and accompanying text.

88. See 42 U.S.C.A. § 18041 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

89. *Id.* § 1396w-3; see also SUMMARY OF NEW HEALTH REFORM LAW, *supra* note 57, at 7.

90. See 42 U.S.C.A. § 18042 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

91. See, e.g., *id.* § 300gg-95 (providing a “model uniform report form for private health insurance issuer[s] seeking to refer suspected fraud”).

92. See *id.* § 262; SUMMARY OF NEW HEALTH REFORM LAW, *supra* note 57, at 9.

93. See 42 U.S.C.A. § 280g-15 (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

94. See *id.* § 18033.

95. See *id.* § 1395i(k).

7. Individual Mandate

The requirement that all individuals purchase qualifying health coverage is perhaps the most well known and controversial aspect of the PPACA. Indeed, as stated, the individual mandate is the centerpiece of constitutional challenges to the PPACA, and it is particularly difficult for many Americans to swallow on a personal level.⁹⁶

In general, the individual mandate requires all U.S. citizens and legal residents to maintain qualifying health care coverage.⁹⁷ Those individuals who refuse to obtain qualifying coverage will be required to pay a penalty—\$695 for each uninsured family member (up to a maximum of \$2085) or 2.5% of household adjusted gross income per year, whichever is greater.⁹⁸ The penalty will be phased in starting in 2014, will reach full amount in 2016, and will increase annually thereafter based on federal cost-of-living adjustments.⁹⁹ Exemptions to the individual mandate include: financial hardship, undocumented immigrants, religious objections, and those without coverage for less than three months.¹⁰⁰

The rationale for the individual mandate is simple: it is the only way to force young, healthy individuals—who often voluntarily forego health insurance coverage—to pay into the system, thereby cross-subsidizing the elderly and unhealthy.¹⁰¹ In other words, it

96. See, e.g., Roger Collier, *The Pitfalls of PPACA #7—The Individual Mandate*, HEALTHCARE FINANCE NEWS (July 7, 2010), <http://www.healthcarefinancenews.com/blog/pitfalls-ppaca-7-individual-mandate>; Stephanie Condon, *Obama Tells Students, Let's Go Change the World*, CBSNEWS, Sept. 17, 2009, http://www.cbsnews.com/8301-503544_162-5317987-503544.html?tag=mncol;lst;1 ("The only way this plan works is if everybody fulfills their responsibility.") (statement of President Obama).

97. See 26 U.S.C.A. § 5000A (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

98. See *id.*; SUMMARY OF NEW HEALTH REFORM LAW, *supra* note 57, at 1. Because it is framed in terms of income, the individual mandate is a progressive penalty or tax. See Robert Pear, *Changing Stance, Administration Now Defends Insurance Mandate as a Tax*, N.Y. TIMES, July 18, 2010, at A15.

99. See 26 U.S.C.A. § 5000A (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)); SUMMARY OF NEW HEALTH REFORM LAW, *supra* note 57, at 1.

100. See 26 U.S.C.A. § 5000A (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

101. See David B. Rivkin, Jr., Lee A. Casey, & Jack Balkin, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. PENNUMBRA 93, 94–95 (2009), <http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf>. Furthermore, because enrollment cannot be denied for pre-existing conditions and premiums are heavily restricted and equalized by the PPACA, it makes little sense for anyone to obtain health insurance until they become sick. As such, financing aside, the mandate is necessary. *Id.*

is the vehicle by which the PPACA achieves the comprehensive, subsidized coverage laid out above.¹⁰² Without the mandate, the PPACA would be financially crippled, rendering the mandate utterly inseverable from the rest of the law.¹⁰³ Interestingly, the individual mandate contains no enforcement mechanism at this time.¹⁰⁴ The government can impose no criminal action or liens on individuals who refuse to purchase qualifying insurance and fail to pay the corresponding fine.¹⁰⁵

III. VIRGINIA'S RESPONSE

*"Are we going to be free men or are we going to be slaves to the federal government of the United States?"*¹⁰⁶

During 2009 and 2010, forty state legislatures proposed legislation to limit, alter, or oppose aspects of health care reform legislation, mostly targeting the individual mandate and the establishment of a single-payer "public option."¹⁰⁷ The push to amend state constitutions and pass legislation in opposition to federal reform efforts originated at the Goldwater Institute in Arizona, where a constitutional amendment will be on the ballot this year.¹⁰⁸ While some of these measures failed or were abandoned in recent legis-

at 95.

102. *Id.* at 94–95. An alternative to the mandate is an income tax increase. *Id.*

103. *See id.* at 95 ("[W]ithout the mandate, the entire thrust of the Obama Administration's proposed regulatory scheme would produce utterly dysfunctional consequences."). This is even truer now that DHHS has reported that the PPACA will not save money, but cost over 250 billion dollars over the next ten years. *See* Memorandum from Richard S. Foster, Chief Actuary, Office of the Actuary, Ctrs. for Medicare & Medicaid Servs., Dep't of Health & Human Servs. 2, 4 (Apr. 22, 2010), available at http://burgess.house.gov/UploadFiles/4-22-2010_-_OACT_Memorandum_on_Financial_Impact_of_PPACA_as_Enacted.pdf.

104. *See* 26 U.S.C.A. § 5000A (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

105. *See id.* § 5000A(g)(2).

106. Olympia Meola, *Pro-Gun, States-Rights Rally Draws 1,000 to Capitol*, RICH. TIMES-DISPATCH, Jan. 18, 2010, at A3, http://www2.timesdispatch.com/news/2010/jan/18/legiat18_20100118-121003-ar-17126/ (quoting Del. Charles W. Carrico, Sr., who, in turn, is quoting Patrick Henry).

107. RICHARD CAUCHI, NAT'L CONF. OF STATE LEG., STATE LEG. CHALLENGING CERTAIN HEALTH REFORMS, 2010 (last updated Sept. 15, 2010), <http://www.ncsl.org/?tabid=18906> [hereinafter NCSL REPORT].

108. *See* Patrick Krey, *State vs. Federal: The Nullification Movement*, THE NEW AMERICAN, Mar. 1, 2010, at 14; CLINT BOLICK, GOLDWATER INST., THE HEALTH CARE FREEDOM ACT: QUESTIONS AND ANSWERS, available at <http://www.goldwaterinstitute.org/file/4372/download/4374> (last visited Oct. 30, 2010).

lative sessions,¹⁰⁹ at least nine states passed opposition laws or amendments in 2010,¹¹⁰ and another four passed nonbinding resolutions in opposition to the federal health care initiative.¹¹¹ A vigorous debate about the efficacy of these opposition bills erupted in early 2010, with the majority of commentators agreeing that they are instruments of dissent with political, rather than legal, force.¹¹²

In addition to legislative action, several state attorneys general promised legal challenges to the PPACA if it contained an individual mandate or other controversial provisions.¹¹³ These attorneys general made good on their word when Attorney General Bill McCollum filed suit in the Northern District of Florida.¹¹⁴

Virginia is no exception to these trends among state governments. Even before its election, the current administration vowed to oppose certain features of federal health care legislation in any way possible.¹¹⁵ The Virginia General Assembly responded similarly, introducing laws and amendments to the state constitution that would directly conflict with federal legislation as it then

109. The measures failed in twenty-six states in 2010 and in an additional state in 2009. See NCSL REPORT, *supra* note 107. In 2010, the measures failed in Alabama, Alaska, Arkansas, California, Colorado, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Rhode Island, South Carolina, South Dakota, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* In 2009, a North Dakota constitutional proposal failed. *Id.* As of early August 2010, legislation opposing federal health care reform is pending in five states: Delaware, Illinois, Ohio, New Jersey, and Pennsylvania. *Id.*

110. *Id.* (These nine states are Arizona, Florida, Georgia, Idaho, Louisiana, Missouri, Oklahoma, Utah, and Virginia.) See *id.* The Arizona and Oklahoma legislation require a statewide vote in 2010 to take effect. *Id.* In late July, the Florida Supreme Court ruled that the constitutional amendment was inappropriate and removed it from the November 2010 ballot. *Id.*

111. See *id.* (These four states are Idaho, South Dakota, South Carolina, and Michigan).

112. See, e.g., Timothy S. Jost, *Can the States Nullify Health Care Reform?*, 362 NEW ENG. J. MED. 869, 869 (2010). However, the reality of that consensus was thrust into jeopardy when District Judge Henry Hudson agreed that the Commonwealth of Virginia had standing to challenge the PPACA based, in part, on the tension between the federal legislation and the Virginia Health Care Freedom Act. See *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 603, 615 (E.D. Va. Aug. 2, 2010).

113. 13 *Attorneys General Threaten Suit over Health Care*, *supra* note 22.

114. See Complaint, *Florida ex rel. McCollum v. Sebelius*, No. 3:10-cv-91, 2010 WL 1038209 (N.D. Fla. filed Mar. 23, 2010) [hereinafter *Florida Complaint*], ECF No. 1.

115. See, e.g., Letter from Twenty Republican Governors to Harry Reid, Senate Majority Leader, Mitch McConnell, Senate Minority Leader, Nancy Pelosi, Speaker of the House, and John Boehner, House Minority Leader (Jan. 13, 2010), <http://www.rga.org/homepage/republican-governors-health-care-bills-omit-reform/> (a letter demonstrating then Governor-elect Bob McDonnell's opposition).

stood.¹¹⁶ The Commonwealth's opposition to the PPACA reached its zenith when Attorney General Ken Cuccinelli filed suit in the Eastern District of Virginia to challenge the constitutionality of the PPACA.¹¹⁷ These measures secured Virginia's place at the forefront of the health care reform opposition movement.

A. Virginia Legislation

By popular accounts, a plurality of Virginians are opposed to the PPACA.¹¹⁸ Beginning in early December 2009, members of Congress filed a string of state bills and resolutions for the 2010 General Assembly Session, reflecting this dissatisfaction.¹¹⁹ Of the six measures introduced in either house, only one failed, although the remaining five were condensed essentially into one law.¹²⁰

1. Senate Bills 283, 311, and 417

Senate Bills 283, 311, and 417 were filed within days of each other in early January 2010.¹²¹ Although identical, the bills were sponsored by three different senators from across the Commonwealth,¹²² perhaps as a maneuver to garner momentum for the legislation. Strikingly, when introduced, almost one-quarter of

116. See *supra* notes 106–16 and accompanying text; *infra* notes 117–46 and accompanying text.

117. See generally Virginia Complaint, *supra* note 26.

118. See, e.g., Jeff E. Schapiro, *Nearly Half in Virginia Oppose Proposal*, RICH. TIMES-DISPATCH, Oct. 13, 2009, at A1 (finding that 49% of Virginians oppose health care reform proposals, “while 39 percent support it and 12 percent are undecided”).

119. See generally *What's Happening at the Capitol Today?*, RICH. TIMES-DISPATCH, Feb. 12, 2010, at A9.

120. See *infra* notes 121–39 and accompanying text. House Joint Resolution 7 was left in the House Privileges and Elections Committee. See H.J. Res. 7, Va. Gen. Assembly (Reg. Sess. 2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=101&typ=bil&val=hj7>.

121. See S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=101&typ=bil&val=sb283> (detailing the introduction of SB283 on Jan. 12, 2010); S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=101&typ=bil&val=sb417> (detailing the introduction of SB417 on January 13, 2010).

122. Senator Frederick M. Quayle from Suffolk sponsored Senate Bill 283. See S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+mbr+SB283>. Senator Stephen H. Martin from Chesterfield sponsored Senate Bill 311. See S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+mbr+SB311>. Senator Jill Holtzman Vogel from Winchester, along with eight co-sponsors, sponsored Senate Bill 417. See S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+mbr+SB417>.

the Virginia Senate had signed on as patrons to the last of the three bills, SB 417.¹²³ As introduced, the bills read:

No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage. No provision of this title shall render a resident of this Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage.¹²⁴

This language is a clear rejection of the individual mandate contained in federal health care legislation, a provision that is critical to financing federal reform efforts.

In less than two weeks, all three bills passed the Senate Committee on Commerce and Labor, with minor amendment, by the slimmest margins they would face.¹²⁵ Despite the Senate Commerce and Labor Committee's ideological makeup—six Republicans and nine Democrats—the senate bills passed eight votes to seven, with Democrat Senators Colgan and Puckett joining the six Republican committee members.¹²⁶ This bipartisan support for the bills foreshadowed their passage by the full senate, a week later, twenty-three votes to seventeen.¹²⁷ In short, the Virginia

123. See S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+mbr=SB417> (providing the nine patrons of SB417); 2010 SENATE OF VA., MEMBERSHIP MAILING LIST, <http://sov.state.va.us/sov%20Portal/PDFs/Mailing%20List-Landscape.pdf> (last updated Sept. 21, 2010) (listing the forty members of the Virginia Senate).

124. See, e.g., S.B. 417, Va. Gen. Assembly (Reg. Sess. 2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+SB417>.

125. See S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+vot+S02V0018+SB0283>; S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+vote+S02V0012+SB0311>; S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+vot+S02V0017+SB0417> ("This section shall not apply to individuals voluntarily applying for coverage under a state-administered program pursuant to Title XIX or Title XXI of the Social Security Act.").

126. See S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+vot+S02V0017+SB0417> (detailing Jan. 25, 2010 vote on Senate Bill 417 in Senate Commerce and Labor Committee); 2010 SENATE OF VA., *supra* note 123 (providing party affiliations).

127. See S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+vot+SV0143SB0417+SB0417> (detailing Feb. 1, 2010 vote on Senate Bill 417 by full Senate); 2010 SENATE OF VA., *supra* note 123 (designating party affiliations).

Senate, although Democrat controlled, flatly rejected the individual mandate on which federal legislation heavily relies for funding.¹²⁸

Senate Bill 417 faced no substantial opposition in the House of Delegates, passing sixty-six votes to twenty-nine.¹²⁹ Finally, to assuage concerns, Governor Bob McDonnell recommended language to clarify that the bills did not prevent (1) courts from ordering the provision of health insurance as a form of alimony or (2) universities from requiring health insurance for their students as a condition of enrollment.¹³⁰ These recommendations were incorporated, passed both houses of the General Assembly, and the bills were signed into law on March 10, 2010.¹³¹

2. House Bills 10 and 722

A month before the introduction of the senate bills, Manassas Delegate Bob Marshall filed the Virginia Health Care Freedom Act in the House of Delegates.¹³² As introduced, the bill read:

No law shall restrict a person's natural right and power of contract to secure the blessings of liberty to choose private health care systems or private plans. No law shall interfere with the right of a person or entity to pay for lawful medical services to preserve life or health, nor shall any law impose a penalty, tax, fee, or fine, of any type, to decline or to contract for health care coverage or to participate in any particular health care system or plan, except as required by a court where an individual or entity is a named party in a judicial dispute. Nothing herein shall be construed to expand, limit or

128. S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010).

129. See H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+vot+HV0543+SB0417>. Senate Bill 283 passed 67 to 29. See H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+vot+HV0541+SB0283>. Senate Bill 311 passed 67 to 28. See H. JOURNAL, House of Delegates, of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+vot+HV0542+SB0311>.

130. See, e.g., S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+amd+SB417AG> (detailing Governor McDonnell's recommendations for SB417).

131. The Senate concurred, 25 to 15, in the Governor's recommendations and the bills moved to his desk for signature. See, e.g., S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+vot+SV0619SB0417+SB0417>. Governor McDonnell then signed the bills into law. See, e.g., Act of Mar. 10, 2010, ch. 108, 2010 Va. Acts ____ (codified at VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2010)).

132. H.B. 10, Va. Gen. Assembly (Reg. Sess. 2010) (enacted as Act of Apr. 21, 2010, ch. 818, 2010 Va. Acts ____).

otherwise modify any determination of law regarding what constitutes lawful medical services within the Commonwealth.¹³³

While stated in terms of positive assertions of liberty and freedom,¹³⁴ House Bill 10 plainly rejects the individual mandate as overbroad. Shortly after its introduction, House Bill 722, which more clearly opposes the individual mandate, was incorporated into House Bill 10 by voice vote.¹³⁵ The Virginia Health Care Freedom Act easily cleared the House of Delegates in early February¹³⁶ and moved into the Virginia Senate, where, after initial hurdles,¹³⁷ it was substantially revised.¹³⁸ The final version of Delegate Marshall's bill was identical to Senate Bills 283, 311, and 417.¹³⁹

3. House Joint Resolution 7

A near mirror to his Virginia Health Care Freedom Act, Delegate Bob Marshall also proposed an amendment to Article I of the Virginia Constitution.¹⁴⁰ The amendment, which would have been

133. *Id.*

134. *See id.*

135. *See* H.B. 722, Va. Gen. Assembly (Reg. Sess. 2010); H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=101&typ=bil&val=hb722> (detailing history of House Bill 722).

136. H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+vot+HV0526+HB0010>.

137. House Bill 722 was mis-assigned to the Senate Committee on Education and Health rather than the Committee on Commerce and Labor. *See* Stephen J. Rossie, *Senate Again Playing Games with Its Own Rules, This Time on HB 10!*, FAMILY FOUNDATION BLOG.COM (Feb. 12, 2010), <http://www.familyfoundationblog.com/2010/02/12/Senate-again-playing-games-with-its-own-rules-this-time-on-hb-10/>. At least some critics suggested this was an intentional act by Virginia Senate Democrats to delay the bills progression and avoid another embarrassing defeat if possible. *Id.*

138. House Bill 10 incorporated House amendments but rejected Senate amendments that would have removed much of the bill's bite. More specifically, Senator Peterson recommended adding the following: "This legislation is merely intended to inform the United States Congress of the resolve of the General Assembly of Virginia in regard to proposed Federal legislation. It is not intended to have any effect upon the existing laws of the Commonwealth or any future laws enacted by this body." *See* S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+amd+HB10ASR> (detailing rejected Senate amendments).

139. *Compare* H.B. 10, Va. Gen. Assembly (Reg. Sess. 2010) (enacted as Act of Apr. 21, 2010, ch. 818, 2010 Va. Acts ____), *with* S.B. 283, Va. Gen. Assembly (Reg. Sess. 2010) (enacted as Act of Mar. 10, 2010, ch. 106, 2010 Va. Acts ____), and S.B. 311, Va. Gen. Assembly (Reg. Sess. 2010) (enacted as Act of Mar. 10, 2010, ch. 107, 2010 Va. Acts ____), *and* S.B. 417, Va. Gen. Assembly (Reg. Sess. 2010) (enacted as Act of Mar. 10, 2010, ch. 108, 2010 Va. Acts ____).

140. *Compare* H.J. Res. 7, Va. Gen. Assembly (Reg. Sess. 2010), *with* H.B. 10, Va. Gen. Assembly (Reg. Sess. 2010) (enacted as Act of Apr. 21, 2010, ch. 818, 2010 Va. Acts ____),

reconsidered in the 2012 Session,¹⁴¹ prohibited “any law [that] impose[s] a penalty, tax, fee, or fine” upon an individual who declines to enter into a contract “for health care coverage or to participate in any particular health care system or plan.”¹⁴² This measure failed in the House Privileges and Elections committee in mid-February, and it was never taken up again.¹⁴³

4. House Joint Resolution 125

In a related action, the House of Delegates resoundingly passed a resolution that urged Congress “to honor state sovereignty under the Tenth Amendment . . . [and] claim[ed] [state] sovereignty . . . over all powers not otherwise enumerated and granted to the federal government.”¹⁴⁴ The House Privileges and Elections Committee and the Constitutional Subcommittee considered and passed the Resolution, but it failed in the Senate Committee on Rules the following month.¹⁴⁵ Similar bills did not fare any better in the 2010 Session.¹⁴⁶

5. Opposition Laws: The Big Picture

Although politically savvy in the Commonwealth, opposition laws like the ones passed in the 2010 Session are pure theatrics.¹⁴⁷ Opposition laws, by operation of the Supremacy Clause of

available at <http://leg1.state.va.us/cgi-bin/legp504exe?101+ful+HB10+pdf>.

141. Any constitutional amendment must be passed by both houses, then “referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates.” See VA. CONST. art. XII, § 1.

142. H.J. Res. 7, Va. Gen. Assembly (Reg. Sess. 2010).

143. See H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=101&typ=bil&val=hj7> (detailing House Joint Resolution 7).

144. See H.J. Res. 125, Va. Gen. Assembly (Reg. Sess. 2010).

145. See H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504exe?101+sum+hj125>. Based on the voting on House Bill 10 and the similar senate bills, the Committee on Rules was 8-7 against the measure. See generally *supra* notes 129, 136 and accompanying text.

146. For instance, House Joint Resolution 5 urged a similar message to Congress, but that Resolution was left in the House Privileges and Elections Committee. See H.J. Res. 5, Va. Gen. Assembly (Reg. Sess. 2010); H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=101&typ=bil&val=hj5>.

147. See, e.g., Mark Pugh, Letter To The Editor, *States Can't Override Federal Legislation*, RICH. TIMES-DISPATCH, Feb. 18, 2010, at A10 (decrying wasted time and energy spent on nullification bills).

the U.S. Constitution, serve little to no legal purpose.¹⁴⁸ More directly, our system of government acknowledges the supremacy of federal law over state law, so that as long as federal law is constitutional, it trumps.¹⁴⁹ In other words, if the individual mandate is unconstitutional, it can be challenged as such *apart from state opposition laws*.

However, with its actions in the 2010 Session, Virginia sent clear and relevant messages to Washington and Virginia's congressional delegation. The five Democrat senators who voted for House Bill 10¹⁵⁰ and related laws signify the unpopularity in Virginia of a federal bill containing the individual mandate. In addition, these state bills maintain momentum and encourage further dissent in the overall opposition movement. Perhaps more powerfully, the Virginia opposition laws provide state sponsorship of mass civil disobedience to the federal government.

B. Attorney General Opinion

In early 2010, in an official opinion initiated by Lieutenant Governor Bill Bolling, Attorney General Bill Mims¹⁵¹ voiced concerns about the constitutionality of the individual mandate and the "Nebraska compromise"¹⁵² contained in the Senate-approved PPACA.¹⁵³ Mims had already joined attorneys general from twelve other states in opposing the Nebraska compromise, and incoming Attorney General Cuccinelli had already signaled his disapproval

148. Attorney General Cuccinelli claims that they lend unique standing to the Commonwealth, but this is tenuous at best. See generally Plaintiff's Memorandum in Opposition to Motion to Dismiss, *Virginia ex rel. Cuccinelli v. Sebelius*, No. 3:10CV188-HEH, at 3 (E.D. Va. Jun. 7, 2010), ECF No. 28.

149. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Hern v. Beye*, 57 F.3d 906, 910 (10th Cir. 1995).

150. H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504exe?101+vot+SV0692HB0010+HB0010>; SENATE OF VA., MEMBERSHIP MAILING LIST, *supra* note 123 (providing party affiliations).

151. Ken Cuccinelli assumed office on January 16, 2010; Bill Mims—now a Virginia Supreme Court Justice—was Attorney General until that time. See *William C. Mims Named to Virginia Supreme Court*, 58 VIRGINIA LAWYER 20, Apr. 10, 2010; Biography of Attorney General Cuccinelli, http://www.oag.state.va.us/Cuccinelli/AG_BIO.html (last visited Oct. 30, 2010); Biography of Attorney General Mims, http://www.oag.state.va.us/Mims/Mims_Bio.html (last visited Oct. 30, 2010).

152. See *supra* note 20 and accompanying text.

153. See Tyler Whitley, *Attorney General Questions Constitutionality of Mandated Health Insurance Purchases*, RICH. TIMES-DISPATCH, Jan. 12, 2010, at B8.

of the individual mandate.¹⁵⁴ In his opinion, which cites James Madison's Federalist No. 45 and the Ninth and Tenth Amendments to the U.S. Constitution, Mims echoed some prominent academics and politicians in questioning the federal government's ability to anchor these provisions to an enumerated Article I power.¹⁵⁵ In particular, Mims challenged (1) the individual mandate as an invalid exercise of Congress's power to regulate interstate commerce and (2) the Nebraska Compromise as a violation of the General Welfare Clause.¹⁵⁶

First, although conceding that Congress has broad power to regulate commerce among the states, Mims concluded that "[t]he insurance mandate is open to constitutional challenge" for possibly exceeding the bounds of the Commerce Clause.¹⁵⁷ Pinpointing the vulnerability in the health care bill, Mims stated that "[a]lthough health care is an economic activity, the failure to purchase health insurance is not an economic activity."¹⁵⁸ The Attorney General rightly pointed out that the Supreme Court's recent Commerce Clause jurisprudence is somewhat ambiguous and perhaps alters years of precedent that allowed regulation of certain intrastate activities.¹⁵⁹ With this in mind, Mims stated that the success of such a challenge is far from clear.¹⁶⁰ Notably, Attorney General Mims did not evaluate the individual mandate's constitutionality as a tax,¹⁶¹ as some commentators have suggested is appropriate.¹⁶²

Speaking to the Nebraska compromise, the Attorney General rejected Bolling's suggestion that the Equal Protection Clause was a viable ground for objection; instead, he pointed to Congress's responsibility to spend money for the "general Welfare of

154. See Rosalind S. Helderman, *Virginia GOP Sets Sights on Thwarting Federal Policies: As General Assembly Convenes, Republicans Plan Bills on Guns, Health Care*, WASH. POST, Jan. 13, 2010, at A1.

155. Opinion Letter from Bill Mims, Attorney Gen. of Va., to Bill Bolling, Lieutenant Governor of Va. (Jan. 11, 2010), <http://billbolling.com/blog/post/1140> [hereinafter Mims Letter].

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See id.*

162. See, e.g., Steven J. Willis & Nakku Chung, *Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169, 178 (2010).

the United States.”¹⁶³ While again acknowledging that Congress has broad latitude to exercise this power to spend for the general welfare, Mims opined that “carving out an exception for a specific state, unrelated to any policy objective other than to secure the vote of a particular senator, would exceed the bounds of what Congress may do under the Spending Clause.”¹⁶⁴ The Nebraska compromise and other provisions that treated individual states preferentially were ultimately dropped from the PPACA,¹⁶⁵ rendering the former Attorney General’s advice moot.¹⁶⁶

C. *Lawsuits*

1. Background

The objections raised by former Attorney General Bill Mims in his opinion were reiterated by current Attorney General Cuccinelli in a March 23 suit filed against Kathleen Sebelius, in her official capacity as Secretary of the DHHS.¹⁶⁷ Cuccinelli’s suit came on the same day as a similar suit filed by Florida Attorney General Bill McCollum and joined by the attorneys general of twelve other states (another seven attorneys general have since joined).¹⁶⁸ Cuccinelli’s rationale for filing apart from McCollum and the other attorneys general was to take advantage of the Eastern District of Virginia’s “Rocket Docket.”¹⁶⁹

163. Mims Letter, *supra* note 155 (quoting U.S. CONST. Art. 1, § 8, cl. 1).

164. *Id.*

165. Randy E. Barnett, *Is Health-Care Reform Constitutional?*, WASH. POST, Mar. 21, 2010, at B1 (providing provisions that favor individual states); Katie Connolly, *Why the ‘Louisiana Purchase’ Isn’t a Dirty Backroom Deal*, NEWSWEEK, Mar. 21, 2010, <http://www.newsweek.com/blogs/the-gaggle/2010/03/21/why-the-louisiana-purchase-isn-t-a-dirty-backroom-deal.html> (explaining why the ‘Louisiana Purchase’ does not favor Louisiana alone); Devin Dwyer et al., *Health Care Bill: Political Winners & Losers*, ABCNEWS, Mar. 22, 2010, <http://abcnews.go.com/Politics/HealthCare/health-care-bill-political-winners-losers/story?id=10169856> (explaining that the ‘Louisiana Purchase’ survived revisions of the bill). The reconciliation bill, signed into law by the President on March 30, 2010, eliminated the Nebraska Compromise. See Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1201, 124 Stat. 1029, 1051–52 (to be codified at 42 U.S.C. § 1396d).

166. See Mims Letter, *supra* note 155.

167. See generally Virginia Complaint, *supra* note 26.

168. See Jennifer Kay, *States Respond in Healthcare Overhaul Lawsuit*, PITTSBURGH POST-GAZETTE, Aug. 7, 2010, at A2 (summarizing arguments and listing states involved). See generally Florida Complaint, *supra* note 114.

169. See Cuccinelli Talks About Planned Health Care Reform Lawsuit, WSL10.COM, Mar. 22, 2010, http://www2.wsls.com/news/2010/mar/22/cuccinelli_talks_about_plan_to_file_lawsuit_over_h-ar-367500/. It is significant that a separate suit has been filed in the

In his complaint, Cuccinelli requests declaratory and injunctive relief from the individual mandate contained in section 1501 of the PPACA.¹⁷⁰ Contending that the mandate exceeds the scope of Congress's reach under the Commerce Clause, the suit asks for a declaration that the mandate is void as unconstitutional and, because it is not severable from the Act as a whole, that the entire PPACA is unconstitutional.¹⁷¹ Specifically citing *United States v. Lopez*¹⁷² and *United States v. Morrison*,¹⁷³ the complaint alleges that, like in those cases, the mandate should be struck down as regulation of noncommercial activity based on questionable effects on interstate commerce.¹⁷⁴ Specifically, Cuccinelli's complaint alleges that "[t]he status of being a citizen or resident of the Commonwealth of Virginia is not a channel of interstate commerce; nor a person or thing in interstate commerce; nor is it an activity arising out of or connected with a commercial transaction."¹⁷⁵ The complaint also highlights the conflict between the Virginia Health Care Freedom Act and the individual mandate,¹⁷⁶ most likely in the hope of bolstering the Commonwealth's standing to bring suit. This juxtaposition also highlights the federalism argument underlying the entire suit. Unlike Florida's suit, Cuccinelli's does not challenge the individual mandate as an invalid exercise of Congress's power to tax.¹⁷⁷ The Virginia case is currently assigned to District Judge Henry Hudson,¹⁷⁸ who denied

Eastern District of Virginia. Because it is faster than the other federal districts slated to hear challenges, the Eastern District will likely reach a disposition sooner and thus establish persuasive precedent for the other suits. As such, the Eastern District of Virginia is uniquely situated to exert influence on the outcome of not just the Virginia challenge, but the others as well. See, e.g., Heather Russell Koenig, *The Eastern District of Virginia: A Working Solution for Civil Justice Reform*, 32 U. RICH. L. REV. 799, 799–800 (1998).

170. See Virginia Complaint, *supra* note 26, at 6–7.

171. See *id.* at 5–6.

172. 514 U.S. 549, 551 (1995) (holding that provisions in the Gun Free School Zones Act of 1990 exceeded Congress's power to legislate under the Commerce Clause).

173. 529 U.S. 598, 605, 627 (2000) (holding that portions of the Violence Against Women Act were unconstitutional because they exceeded Congress's Commerce Clause power).

174. See Virginia Complaint, *supra* note 26, at 5–6.

175. *Id.* at 5.

176. *Id.* at 2.

177. Compare *id.* at 5–7 (noting the lack of any tax-based complaint), with Florida Complaint, *supra* note 114, at 17–18 (directly raising the tax issue).

178. See Julian Walker, *Judge in Vick's Dogfighting Case Assigned to Anti-Health-Bill Suit*, VIRGINIAN-PILOT, Mar. 26, 2010, at A8. The Virginia suit was originally assigned to Robert E. Payne, who recused himself on March 23 for undisclosed reasons. *Id.*

the federal government's motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim in early August 2010.¹⁷⁹

2. Other Suits

A third suit was also filed on March 23, challenging the individual mandate on behalf of a nonprofit organization associated with Liberty University and eight individuals in the Western District of Virginia ("Liberty suit").¹⁸⁰ The merits of these three lawsuits—two in Virginia and one in Florida—are somewhat similar, but the parties and jurisdiction of each may be relevant to key procedural issues.¹⁸¹

The Florida and Liberty suits are more expansive in their substantive allegations. For instance, the Florida suit challenges the PPACA as violating principles of federalism generally¹⁸² and the prohibition on unapportioned capitation taxes specifically.¹⁸³ The latter of these arguments is seen by some as the strongest basis for attacking the PPACA.¹⁸⁴ The Liberty suit adds complaints of Free Exercise, Establishment, and Equal Protection Clause violations, among others, for exempting select religions from the individual mandate and funding abortions with money collected by operation of the individual mandate.¹⁸⁵

Finally, the Goldwater Institute initiated a suit in Arizona on August 12 ("Goldwater suit").¹⁸⁶ In addition to the Commerce Clause and Taxing and Spending Clause challenges mentioned above, the Goldwater suit makes at least three unique constitutional arguments against the PPACA. First, the Goldwater suit alleges that the PPACA violates the individual rights to medical

179. See *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 601, 615 (E.D. Va. Aug. 2, 2010).

180. See First Amended Complaint for Declaratory, Preliminary and Permanent Injunctive Relief, *Liberty University, Inc. v. Geithner*, No. 6:10-cv-00015-nkm (Apr. 14, 2010) [hereinafter *Liberty Complaint*] (amending the original complaint filed on Mar. 23, 2010).

181. See *infra* notes 226–48 and accompanying text.

182. See *Florida Complaint*, *supra* note 114, at 15–17.

183. See *id.* at 17–18.

184. See, e.g., *Willis & Chung*, *supra* note 162, at 169, 170, 178.

185. See *Liberty Complaint*, *supra* note 180, at 28–35.

186. See generally *Civil Rights Complaint for Declaratory and Injunctive Relief*, *Coons v. Geithner*, No. 2:10-cv-01714 (Aug. 12, 2010), ECF No. 1.

autonomy and privacy guaranteed by the Fourth, Fifth, and Ninth Amendments.¹⁸⁷ In short, the Goldwater Institute contends that under the PPACA, health insurance options and autonomy to make personal health care decisions will be gradually restricted.¹⁸⁸ Second, the Goldwater suit contends that the PPACA violates the First Amendment rights of Arizona's elected representatives by establishing a new agency—the Independent Payment Advisory Board (“IPAB”)—which has sweeping authority to set health care costs and cannot be repealed by Congress, except for a brief window in 2017.¹⁸⁹ The Goldwater suit argues that the new agency deprives Arizona representatives of their constitutional right and responsibility to act in the best interests of Arizona citizens.¹⁹⁰ Third, the Goldwater suit charges that the IPAB violates separation of powers principles because it is not subject to meaningful oversight by the courts or Congress.¹⁹¹

Most recently, a federal district judge in the Northern District of Florida refused to dismiss the lawsuit filed by Florida Attorney General Bill McCollum and other state attorneys general.¹⁹² On October 14, 2010, Judge Vinson made two strong rulings against the United States.¹⁹³ First, he firmly rejected the argument that the individual mandate is a tax, citing numerous indicators in the text of the PPACA itself.¹⁹⁴ Second, Judge Vinson indicated his agreement with the plaintiffs that the PPACA represents an unprecedented exercise of Congress's Commerce Clause power.¹⁹⁵ In

187. *Id.* at 37–42.

188. *See id.* at 39–40.

189. *Id.* at 25, 28–29, 46.

190. *See id.* at 45–46.

191. *See id.* at 64.

192. *Florida ex rel. McCollum v. Sebelius*, No. 3:10-cv-91-RV/EMT, 2010 WL 4010119, at *36 (N.D. Fla. Oct. 14, 2010) (denying defendant's motion to dismiss counts one and four of the complaint).

193. *See id.* at *12, *34–35.

194. *See id.* at *12 (“[I]t ‘clearly appears’ from the statute itself . . . that Congress did not intend to impose a tax when it imposed the penalty. To hold otherwise would require me to look beyond the plain words of the statute. I would have to ignore that Congress: (i) specifically changed the term in previous incarnations of the statute from ‘tax’ to ‘penalty;’ (ii) used the term ‘tax’ in describing the several other exactions provided for in the Act; (iii) specifically relied on and identified its Commerce Clause power and not its taxing power; (iv) eliminated traditional IRS enforcement methods for the failure to pay the ‘tax;’ and (v) failed to identify in the legislation any revenue that would be raised from it, notwithstanding that at least seventeen other revenue-generating provisions were specifically so identified.”).

195. *See id.* at *34 (“At this stage in the litigation, this is not even a close call. . . . This case law is instructive, but ultimately inconclusive because the Commerce Clause and Ne-

essence, the foundational arguments of the Florida lawsuit remain intact. Motions for summary judgment will be heard before Judge Vinson on December 16, 2010.¹⁹⁶

Because they are the primary arguments in all four suits, and in the Virginia suit especially, this article details only the Commerce Clause and Taxing challenges.

3. Merits

As should be obvious by now, constitutional challenges to the PPACA speak less to health care policy and more to the proper role of national government under our Constitution. As all three suits hastily recognize, the federal government is of limited powers, unable to regulate unless specifically empowered to do so by the Constitution.¹⁹⁷

a. Commerce Clause Challenge

The primary authority for Congress to act is found in the Commerce Clause, which entitles the national legislature to regulate commerce between the states.¹⁹⁸ Until the mid-twentieth century, the Commerce Clause was narrowly construed, reaching only commerce that physically crossed state lines or utilized the channels or instrumentalities of commerce, such as highways and cargo ships.¹⁹⁹ That changed in *Wickard v. Filburn*, a watershed case in which the Supreme Court permitted Congress to regulate purely local activity provided it has “a substantial economic effect on interstate commerce.”²⁰⁰ Under this broader reading of the Commerce Clause, federal legislation went virtually unchallenged

cessary and Proper Clause have never been applied in such a manner before. The power that the individual mandate seeks to harness is simply without prior precedent.”).

196. See Amended Final Scheduling Order, *Florida ex rel. McCollum v. Sebelius*, No. 3:10-cv-91-RV/EMT (N.D. Fla. Oct. 14, 2010), ECF No. 76.

197. See, e.g., THE FEDERALIST NO. 14, at 97 (James Madison) (Clinton Rossiter ed., 2003) (“[The federal government’s] jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, . . . [and] subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity.”).

198. U.S. CONST. art. I, § 8, cl. 3.

199. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 1–3 (2010); see, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196–97 (1824).

200. 317 U.S. 111, 125 (1942) (holding that purely intrastate activity can be regulated under the Commerce Clause if it would affect interstate commerce when cumulated).

until the Rehnquist Court intervened in *Lopez*²⁰¹ and *Morrison*.²⁰² In both of those cases, the Supreme Court struck down federal laws purporting to regulate intrastate activities because they had only speculative impact on interstate commerce.²⁰³

More recently, in *Gonzalez v. Raich*, the Supreme Court held that Congress may regulate local activity if doing so is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”²⁰⁴ This holding was seen by many as the return to the Court’s more lenient Commerce Clause jurisprudence, but that assumption has yet to be affirmed by the Supreme Court itself.²⁰⁵

Modern Commerce Clause jurisprudence, then, allows Congress to regulate (1) the use of channels and instrumentalities of interstate commerce and (2) any activity—whether interstate or intrastate—having a substantial effect on interstate commerce.²⁰⁶ Congress may additionally control local activities that are necessary for effective regulation of interstate commerce.²⁰⁷ However, purely noneconomic, local activity that has tenuous effects on interstate commerce cannot be regulated by Congress—this is the teaching of *Lopez* and *Morrison*.²⁰⁸

201. 514 U.S. 549 (1995).

202. 529 U.S. 598 (2000).

203. See *id.* at 617 (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”); *Lopez*, 514 U.S. at 564 (“Under the [speculative] theories that the Government presents in support of [its power], it is difficult to perceive any limitation on federal power. . .”).

204. 545 U.S. 1, 23–25 (2005) (quoting *Lopez*, 514 U.S. at 561).

205. See Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 232–33 (2009); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 889–90 (2009).

206. See Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation’s Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 510 (2010).

207. Accord Thane Rehn, Note, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991, 1991 (2008) (“If the regulated activity is noneconomic, the Court first asks whether Congress has occupied the field with a regulatory scheme that deals with interstate commercial activity. Second, it asks whether regulation of the noneconomic activity is necessary to prevent the broader regulatory scheme from being undercut.”).

208. See *Morrison*, 529 U.S. at 613, 617–18 (citing *Lopez*, 514 U.S. at 567–68).

Many lawmakers are aware of this scheme, and they specifically hooked the individual mandate to the language of *Lopez* and *Morrison*:

The [individual mandate] regulates *activity that is commercial and economic in nature*: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. Health insurance and health care services are a significant part of the national economy. . . . Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.²⁰⁹

This, according to Cuccinelli and other dissenters, is where the analysis breaks down. Patently, the activities that Congress is purporting to regulate in the PPACA are the decisions whether, how, and when to obtain health care and health insurance. This necessarily includes the decision not to enter the health insurance market in the first place, which, according to Cuccinelli, amounts to inactivity regardless of the effects on interstate commerce.²¹⁰ In other words, “[t]he status of being a citizen . . . is entirely passive.”²¹¹

The opposition’s response is not overly difficult to imagine: remaining uninsured is actually an activity—namely, that of self-insuring and self-medicating rather than purchasing insurance.²¹² Not only that, remaining uninsured is an *economic* activity.²¹³ And once the decision to self-insure is framed as an activity, *Gonzalez* provides the language to bring the individual mandate within congressional authority. That is, prohibiting self-insurance is essential to the success of the PPACA—which is presumably a valid exercise of the Commerce Clause—and the entire endeavor would

209. PPACA, Pub. L. No. 111-148, § 1501(a)(2)(A), (B), 124 Stat. 119, 242–43 (2010) (to be codified at 42 U.S.C. § 18091) (emphasis added).

210. See Virginia Complaint, *supra* note 26, at 5.

211. *Id.*

212. See Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, 362 NEW ENG. J. MED. 482, 483 (2010) (“Critics charge that these people are not engaged in any activity that Congress might regulate; they are simply doing nothing. This is not the case. Such people actually self-insure through various means. When uninsured people get sick, they rely on their families for financial support, go to emergency rooms (often passing costs on to others), or purchase over-the-counter remedies. They substitute these activities for paying premiums to health insurance companies. All these activities are economic, and they have a cumulative effect on interstate commerce.”).

213. See *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 614 (E.D. Va. Aug. 2, 2010) (“[C]onsuming health care services without paying for them is activity, plain and simple.” (quoting counsel for Secretary Sebelius at oral argument)).

be undercut if Congress was unable to regulate it. Therefore, per *Gonzalez*, Congress is able to invoke the Necessary and Proper Clause for authority to enact the individual mandate.

This explanation is problematic for at least three reasons. First, it is not an accurate reflection of Congress's command. Section 1501 of the PPACA states: "If an applicable individual *fails to meet the requirement* of [maintaining minimum essential coverage contained in] subsection (a) for 1 or more months during any calendar year beginning after 2013, then, . . . there is hereby imposed a penalty with respect to the individual . . ."²¹⁴ Congress acknowledged that it was penalizing inactivity, and it plainly intended to do so.²¹⁵ Second, the Commerce Clause has never been utilized to compel citizens to purchase goods or services, as is necessarily the case here.²¹⁶ No matter how language from the Court's *Gonzalez* opinion is harnessed by supporters of the mandate, the absence of direct precedent lends credibility to the challenge. Third, it is difficult to glean a limiting principle in the Commerce Clause if the individual mandate is upheld. If Congress successfully requires the purchase of health insurance by all Americans, it will have reached individual "inactivity that is expressly designed to avoid entry into the relevant market."²¹⁷ If failure to obtain health insurance is deemed interstate commerce, it is hard to fathom acts of omission that could not be tied to other national deficiencies and thus be subject to federal regulation.²¹⁸

b. Taxing and Spending Challenge

Although the Obama Administration and congressional Democrats initially insisted that the individual mandate contained in

214. PPACA, Pub. L. No. 111-148, § 1501(b)(1), 124 Stat. 119, 244 (2010) (to be codified at 26 U.S.C. § 5000A) (emphasis added).

215. See generally *id.*

216. See Jost, *supra* note 112, at 871 (citing Balkin, *supra* note 212, at 482–83).

217. RANDY BARNETT ET AL., WHY THE PERSONAL MANDATE TO BUY HEALTH INSURANCE IS UNPRECEDENTED AND UNCONSTITUTIONAL, HERITAGE FOUND. 7 (Dec. 9, 2009), <http://www.heritage.org/Research/Reports/2009/12/Why-the-Personal-Mandate-to-Buy-Health-Insurance-Is-Unprecedented-and-Unconstitutional> (emphasis omitted).

218. For instance, what if Congress wants to halve the price of cars because its elected officials decide everyone has a fundamental right to drive if they desire to? In this hypothetical, in order to implement and fund the plan, everyone must buy a General Motors automobile or pay a \$1000 penalty. This example is similar to the health care mandate, but it opens a door that many Americans want shut and locked.

section 1501 of the PPACA was not a tax (rather, a penalty), administration attorneys began heavily emphasizing Congress's power to tax as the linchpin of their legal case in July 2010.²¹⁹ It is apparent from the detailed congressional findings in the PPACA itself, as well as the analysis of the bill performed by Congress's Joint Committee on Taxation, that Congress did not originally act with the intention of invoking its power to tax and spend.²²⁰ Instead, Congress detailed specific findings that the health care market is integral to the American economy and that participation in that market is unavoidable, clearly invoking its Commerce Clause power.²²¹ And like the Obama Administration, without exception the Joint Committee on Taxation referred to the mandate as a "penalty," not a "tax," in its March 2010 financial report to Congress.²²² However, while making the tax argument is politically disadvantageous and arguably dishonest, it may provide the strongest ground for upholding the PPACA.²²³

Although not pleaded in the Commonwealth's suit, the Liberty and Florida lawsuits allege that the PPACA violates the prohibition against unapportioned capitation or direct taxes set forth in Article I, Section 9 of the Constitution.²²⁴ Rather than a tax on income or a tax on activity (excise tax), the Liberty suit states that the tax levied on individuals refusing to purchase health insurance is a capitation tax—one assessed against the person just for

219. See, e.g., Transcript of Oral Argument on Defendant's Motion to Dismiss, *Virginia ex rel. Cuccinelli v. Sebelius*, No. 3:10CV188, at 19:16–17 (E.D. Va. July 1, 2010), ECF No. 81.

220. However, the provision's location in Title 26 of the U.S. Code—the Internal Revenue Code—supports the tax power argument. See PPACA, Pub. L. No. 111-148 § 1501(b), 124 Stat. 119, 242–49 (2010) (amended 2010) (to be codified as amended at 26 U.S.C. § 5000A); STAFF OF J. COMM. ON TAXATION, TECHNICAL EXPLANATION OF THE REVENUE PROVISIONS OF THE "RECONCILIATION ACT OF 2010," AS AMENDED, IN COMBINATION WITH THE "PATIENT PROTECTION AND AFFORDABLE CARE ACT," J. COMM. DOC. NO. JCX-18-10, at 33 (2010), available at <http://www.jct.gov/publications.html?func=startdown&id=3673>.

221. PPACA, Pub. L. No. 111-148, §1501(a)(2)(A)–(H), 124 Stat. 119, 242–44 (2010) (to be codified at 42 U.S.C. § 1809).

222. See J. COMM. DOC. NO. JCX-18-10, *supra* note 220, at 31–34. It was not until May 2010 that the Joint Committee on Taxation revised its vocabulary, referring to the penalty as an excise tax. See J. COMM. ON TAXATION, ERRATA FOR JCX-18-10, J. COMM. DOC. NO. JCX-27-10, at 2 (2010).

223. See, e.g., Pear, *supra* note 98 (quoting legal scholars as stating President Obama has been dishonest about the nature of the insurance mandate, but the mandate may be a constitutional tax).

224. See Florida Complaint, *supra* note 114, at 17–18; Liberty Complaint, *supra* note 180, at 35–36.

existing.²²⁵ As opposed to its nearly boundless freedom to lay income taxes, in assessing capitation taxes Congress is more greatly restricted by the Constitution. Specifically, capitation taxes must be apportioned among the states according to population as calculated by the census.²²⁶ To pass constitutional muster, then, the PPACA tax would need to be apportioned among the states evenly, so that each state pays a percent of the total tax equal to its portion of the total population. This is not the case,²²⁷ and under the current structure, states with large populations of poor or wealthy individuals might not pay their fair share. As Steven J. Willis and Nakku Chung aptly explain:

Louisiana has approximately 4.5 million residents. Suppose 150,000 in 2014 owe the lack-of-health-insurance tax. The total amount due would be \$14,250,000 from Louisianans. The per capita amount would be \$3.17. Vermont has approximately 621,760 residents. Suppose 500 persons in 2014 owe the lack-of-health-insurance tax. The total amount due would be \$47,500 from Vermonters. The per capita amount would be 8 cents. Because the Louisiana amount would differ from the Vermont amount, the tax would not satisfy the apportionment requirement.²²⁸

The rejoinder to this argument will probably be that the tax is not a capitation tax, but instead qualifies as a valid excise tax. As such, the retort goes, it can be assessed disproportionately. The trouble with this argument is that excise taxes must be laid on activities, such as buying cigarettes or inheriting money, not against individuals.²²⁹ This tax, although called an excise tax by Congress, is unlike any existing excise tax because it applies to a *failure to act* by the general population.²³⁰ It is more appropriately a direct tax, subject to the constitutional limitations set forth above.

225. See Liberty Complaint, *supra* note 180, at 35.

226. See U.S. CONST. art I, § 9, cl. 4; see also *Eisner v. Macomber*, 252 U.S. 189, 206 (1920) (constitutional limitations on direct taxes are not abrogated by Sixteenth Amendment).

227. See *supra* notes 219–21 and accompanying text.

228. Willis & Chung, *supra* note 162, at 193 (footnotes omitted).

229. See Rivkin, Jr., Casey, & Balkin, *supra* note 101, at 111 (arguing that characterizing the mandate penalty as an excise tax is “intellectually incoherent”).

230. See Willis & Chung, *supra* note 162, at 170.

4. Procedural Considerations

Even if the suits are eventually successful, they may run into procedural difficulties in the near future, namely standing and ripeness concerns. In the summer of 2010, the Virginia suit survived the Obama Administration's motion to dismiss for lack of standing, lack of a ripe dispute, and failure to state a claim upon which relief could be granted.²³¹ Administration attorneys will certainly reiterate and refine these concerns in motions to dismiss and for summary judgment in the fall of 2010 and beyond, hoping for dismissal of the remaining suits without reaching their merits. Early dismissal certainly will be advantageous for the Obama Administration because negative public perception of health care reform may continue to increase with the passage of time.²³²

a. Standing

Federal courts can entertain only suits initiated by individuals who have "standing,"²³³ which requires a plaintiff to demonstrate (1) past or imminent injury in fact that is (2) fairly traceable to and thus caused by the defendant's allegedly unlawful behavior, and (3) likely to be redressed by a favorable judgment.²³⁴ The individual mandate requires individuals and most employers to obtain or provide health insurance or pay a penalty.²³⁵ It is fairly

231. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 601–02, 615 (E.D. Va. Aug. 12, 2010); see also *infra* notes 235–56 and accompanying text.

232. Public support for health care reform efforts has, by all accounts, declined significantly since the legislation's passage in early 2010. Compare Lydia Saad, *By Slim Margin, Americans Support Healthcare Bill's Passage*, GALLUP (Mar. 23, 2010), <http://www.gallup.com/poll/126929/Slim-Margin-Americans-Support-Healthcare-Bill-Passage.aspx> (reporting that, as of March 2010, 49% of American adults favored the PPACA and 40% disapproved of it), with *Health Care Law: 56% Favor Repeal of Health Care Law*, RASMUSSEN REPORTS (Aug. 9, 2010), http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/health_care_law (Aug. 9, 2010) (reporting that "support for repeal [of the PPACA] has ranged from 52% to 63% since the he [sic] law was passed by Congress in March [2010]").

233. Standing is derived from the "case or controversy" requirement of Article III, which embodies the idea of separation of powers foundational to our system of government. See, e.g., *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471–76 (1982)).

234. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted).

235. See 26 U.S.C.A. § 5000A (West, Westlaw through P.L. 111-255 (excluding P.L. 111-203 and P.L. 111-240)).

straightforward, then, that the individual and employer plaintiffs in the Michigan suit have standing to sue.²³⁶ The mandate will require them to pay for health insurance, an economic injury; that injury is clearly caused by section 1501 of the PPACA; and a declaratory judgment finding the PPACA unconstitutional will redress that economic harm.²³⁷

It is less clear whether Virginia and Florida similarly have standing to sue in their respective suits. This is because the individual mandate does not directly injure the states, but merely imposes obligations that may indirectly cost them money.²³⁸ Standing doctrine in American jurisprudence generally does not recognize such claims of speculative, indirect injury.²³⁹

However, the states' position may be improved by the recent standing case *Massachusetts v. EPA*.²⁴⁰ In that case, the Supreme Court reaffirmed that states have standing to sue the federal government in order to protect their sovereign and quasi-sovereign interests.²⁴¹ The liberal bloc of the Court went on to proclaim that a state's stake in protecting its quasi-sovereign interests "is entitled to special solicitude in our standing analysis," essentially agreeing to loosen the standing analysis for states in certain circumstances.²⁴² In the same breath, however, the Court declared that "there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what [*Massachusetts v.*] *Mellon*²⁴³ prohibits) and allowing a State to assert its rights under federal law (which it

236. See generally Complaint, Thomas More Law Ctr. v. Sebelius, No. 2:10-cv-11156-GCS-RSW (E.D. Mich. Mar. 23, 2010) [hereinafter Michigan Complaint], ECF No. 1.

237. See *id.* at 2–3. The Michigan suit was recently dismissed on its merits by District Judge George Steeh. That the suit was not dismissed for procedural defects supports the conclusion that the plaintiffs had standing. See Thomas More Law Ctr. v. Obama, No. 10-CV-11156-GCS-RSW, 2010 WL 3962805 at *4 (E.D. Mich. Oct. 7, 2010).

238. Indeed, the Florida Complaint attempts to establish standing despite this, claiming immediate administrative costs: "The [PPACA] effectively requires that Florida immediately begin to devote funds and resources to implement the Act's sweeping reforms across multiple agencies of government." See Florida Complaint, *supra* note 114, at 14.

239. See *Lujan*, 504 U.S. at 560 ("[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'") (alteration in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

240. 549 U.S. 497 (2007).

241. *Id.* at 520 & n.17.

242. *Id.*

243. 262 U.S. 447, 485–86 (1923) (citing *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)).

has standing to do).”²⁴⁴ Given this dichotomy, it seems likely that state challenges to the individual mandate based on the Commerce Clause will be rejected as nothing more than attempts to protect citizens from the operation of the PPACA.²⁴⁵ A state would more likely have standing to challenge the mandate as a tax in violation of the constitutional requirement that direct taxes be apportioned among the states according to the census—a provision that more clearly protects and benefits states’ and state sovereign’s interests.²⁴⁶ Under either of these scenarios, states will face difficulty overcoming established precedent holding that states lack the power to challenge the constitutionality of federal law on behalf of their citizens.²⁴⁷

b. Ripeness

The other procedural hurdle for healthcare suits is whether they are ripe for judicial intervention. Ripeness considerations usually arise when, as here, preenforcement review of a statute is sought.²⁴⁸ In such circumstances, courts will generally intervene if (1) a controversy presents a question of law fit for judicial decision and (2) a party would be negatively impacted by withholding or postponing judicial consideration of the matter.²⁴⁹ In other words, if injuries are so speculative or insignificant that they may never occur, a court should decline to adjudicate the dispute as unripe. Under this analysis, individual plaintiffs challenging the

244. *Massachusetts v. EPA*, 549 U.S. at 520 n.17 (citing *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447 (1945)).

245. On the other hand, it is possible to view these challenges as states asserting their right to control intrastate activities under the Tenth Amendment, which is a sovereign interest presumably entitled to “special solicitude” in the standing analysis.

246. See Memorandum from Bill McCollum, Attorney Gen. of Fla. to Harry Reid, Senate Majority Leader, Nancy Pelosi, Speaker of the House of Representatives, Mitch McConnell, Senate Minority Leader, and John Boehner, House Minority Leader (Jan. 19, 2010) at 4, [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7ZUMNW/\\$file/HealthCareMemo.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7ZUMNW/$file/HealthCareMemo.pdf). Furthermore, framing the injury in these terms—that is challenging the method in which the mandate is levied rather than its applicability to state citizens—makes standing more likely. See *Massachusetts v. EPA*, 549 U.S. at 520 n.17.

247. See Timothy Stoltzfus Jost, Opinion, *Sanction the 18 State AGs*, NAT’L L.J., Apr. 12, 2010, at 43 (citing *Mellon*, 262 U.S. at 483–85).

248. See, e.g., *United Public Workers of Am. v. Mitchell*, 330 U.S. 75, 86–89 (1947).

249. See, e.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967) (“[The] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”).

health insurance mandate (like those in the Michigan suit) will probably run into ripeness problems because it does not take effect until 2014.²⁵⁰ Because the PPACA is unlikely to be repealed or amended in the next four years, these individual plaintiffs are probably unable to demonstrate hardship from postponing the case until after the mandate takes effect. As such, they will likely fail to present a controversy ripe for adjudication.²⁵¹

State plaintiffs, on the other hand, will likely prevail in the ripeness analysis because they can more readily show hardship from postponing suit. That is, if states implement the PPACA without knowing whether the individual mandate imposed by the statute is valid, they risk wasting substantial state funds.²⁵² This could impose a palpable and considerable hardship on the state, and this argument lends credence to the ripeness of the controversy. This is precisely the argument that Virginia Attorney General Cuccinelli mounted in opposition to the federal government's motion to dismiss, and Judge Hudson embraced the rationale.²⁵³

5. Judge Hudson's August 2010 Memorandum Opinion

On August 2, 2010, Judge Hudson refused to dismiss the Virginia suit for lack of subject matter jurisdiction—based on standing and ripeness arguments—or for failure to state a claim on which relief could be granted.²⁵⁴ While the decision is not a resolution on the merits of the case, it represents a victory for Virginia in the first of many hurdles to come. The remainder of this section is devoted to a discussion of the district court's ruling on

250. See generally Michigan Complaint, *supra* note 236.

251. The individuals may, however, be able to show that any hardship on the state would ultimately work harm on its citizens. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201–02 (1983) (“To require the industry to proceed without knowing whether the moratorium is valid would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens of California.”).

252. See Zachary Roth, *Behind the Lawsuit: Florida AG Turned to Beltway Fixture—and Old Lobbying Pal—for Health-Care Challenge*, TALKINGPOINTSMEMO, Mar. 25, 2010, http://tpmmuckraker.talkingpointsmemo.com/2010/03/behind_the_lawsuit_florida_ag_turned_to_beltway_f.php.

253. See *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 608 (E.D. Va. Aug. 2, 2010).

254. See *id.* at 601, 615.

standing, ripeness, and the sufficiency of the Commonwealth's claims.²⁵⁵

First, the district court held that Virginia had standing to bring its lawsuit based on the Virginia Health Care Freedom Act—its opposition law—and the state's interest in enforcing that law.²⁵⁶ The opinion succinctly summarizes the federal government's argument:

The Secretary marginalizes the conflict between Section 1501 [of the PPACA] and the Virginia Health Care Freedom Act as a political policy dispute manufactured for the sole purpose of creating standing. The resulting abstract policy dispute causes no imminent injury to the sovereign and is thus insufficient to support standing to challenge a federal enactment.²⁵⁷

Furthermore, the federal government challenged that Virginia was actually prosecuting the case on behalf of its citizens, and acting in such a *parens patriae* capacity vis-à-vis the federal government that was forbidden by the Supreme Court nearly a century ago.²⁵⁸ The Commonwealth rejected that it was acting on behalf of its citizens, and instead asserted injury to its sovereign interest in enforcing its duly enacted laws as the basis of standing.²⁵⁹ Judge Hudson agreed with the Commonwealth, stating:

Although this lawsuit has the collateral effect of protecting the individual interests of the citizens of the Commonwealth of Virginia, its primary articulated objective is to defend the Virginia Health Care Freedom Act from the conflicting effect of an allegedly unconstitutional federal law. Despite its declaratory nature, it is a lawfully-enacted part of the laws of Virginia. The purported transparent legislative intent underlying its enactment is irrelevant. The mere existence of the lawfully-enacted statute is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it.²⁶⁰

255. Judge Hudson heard motions for summary judgment in the case on October 18, 2010. *Virginia ex rel. Cuccinelli v. Sebelius*, No.3:10CV188-HEH (E.D. Va. summary judgment argued Oct. 18, 2010), ECF No. 156.

256. *Cuccinelli*, 702 F. Supp. 2d at 605–07 (quoting *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008)).

257. *Id.* at 602 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 484–85 (1923)).

258. *Id.* (quoting *Mellon*, 262 U.S. at 485–86; citing *id.* at 485).

259. *Id.* at 602–03 (citing *Diamond v. Charles*, 476 U.S. 54, 65 (1986)).

260. *Id.* 605–06.

The district court found Virginia's challenge to be more akin to a sovereign asserting its own rights rather than those of its citizens, focusing on Virginia's power to create and enforce a binding legal code and the federal government's interference with that power in an arguably unconstitutional manner.²⁶¹ In the district court's opinion, such interference amounts to sufficient injury-in-fact to satisfy Article III's standing requirement.²⁶²

Second, the district court found the dispute was ripe for review.²⁶³ Although the individual mandate does not go into effect until 2014, the court observed, "the Commonwealth must revamp its health care program to ensure compliance with the enactment's provisions, particularly with respect to Medicaid. This process will entail more than simple fine tuning."²⁶⁴ In other words, because the injury to Virginia in this case is the collision of state and federal law, and because the federal government has clearly indicated its intent to enforce the individual mandate on Virginia citizens despite contrary state law, the impending injury is more than a mere possibility and is thus ripe for review.²⁶⁵

Third, the district court found that Virginia had successfully argued a legally viable case, sufficient to move forward.²⁶⁶ Stressing that the parties put forth widely divergent arguments and interpretations of precedent, the court reduced the case to "the single question of whether or not Congress has the power to regulate—and tax—a citizen's decision not to participate in interstate commerce."²⁶⁷ After rehashing the arguments on both sides of this question, the district court determined that no Supreme Court or U.S. Court of Appeals case had extended either the Commerce Clause or the Taxing and Spending Clause to the extent sought by the federal government, and, for that reason, the case required additional proceedings.²⁶⁸

261. *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982); *Ctr. For Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 476–77 (D.C. Cir. 2009); *Wyoming*, 539 F.3d at 1242).

262. *Id.* 606–07 (quoting *Wyoming*, 539 F.3d at 1242).

263. *Id.* at 608.

264. *Id.*

265. *Id.* (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960); *Int'l Longshoremen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954)) (citing *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988)).

266. *See id.* at 615.

267. *Id.*

268. *See id.* at 612, 615.

While it is important to keep in mind that Judge Hudson's opinion merely declines to terminate the lawsuit early, strands of the opinion may shed light on future proceedings—or at least the judge's current stance on the subjects of those future proceedings. Importantly, the opinion focused on—and seemingly accepted—the Commonwealth of Virginia's characterization of the Commerce Clause analysis.²⁶⁹ For instance, the opinion describes the *Lopez* and *Morrison* decisions as “limit[ing] the boundaries of Commerce Clause jurisdiction to activities *truly* economic in nature and that *actually* affect interstate commerce.”²⁷⁰ This is presumably in contrast to the case at hand, where the regulation is perhaps not truly economic or actually an activity affecting interstate commerce. That notion is bolstered by the judge's discussion of the Commonwealth's argument, and especially his characterization of that argument as the federal government attempting to regulate “a virtual state of repose—or idleness—the converse of activity.”²⁷¹ Later, in stating that the relevant precedent is inconclusive, the district court stated that “[n]ever before has the Commerce Clause . . . been extended this far.”²⁷² And most strikingly, the court practically opens its analysis of the Commerce Clause issue by stating, “[t]he congressional enactment under review . . . literally forges new ground and extends Commerce Clause powers beyond their current high watermark.”²⁷³ Each of these instances indicates that Judge Hudson sympathizes with the Commonwealth of Virginia, or that at least he finds merit in the Commonwealth's framing of the Commerce Clause challenge.

A second observation from the opinion is perhaps the most important aspect of the lawsuit going forward. Near the beginning of the discussion regarding the sufficiency of Virginia's claims, the district court noted that “[w]hile this Court's decision may set the initial judicial course of this case, it will certainly not be the final word.”²⁷⁴ Without a doubt, regardless of the outcome in the Eastern District of Virginia, the Virginia lawsuit will be appealed to the Fourth Circuit Court of Appeals, and certiorari to the Supreme Court of the United States probably will be sought.

269. *See id.*

270. *Id.* at 610 (emphasis added) (citing 514 U.S. 549 (1995); 529 U.S. 598 (2000)).

271. *Id.*

272. *Id.* at 612.

273. *Id.* at 609.

274. *Id.*

IV. ADDITIONAL HURDLES

A. *Enforcement Problems*

Even if the individual mandate survives constitutional challenge, the federal government faces the difficulty of collecting the penalties it imposes. This difficulty is due in large part to the U.S. Senate's decision to waive criminal penalties and forbid the imposition of liens or levies on taxpayer property for failure to pay.²⁷⁵ In searching for a solution, IRS officials recently stated that although "[t]he Internal Revenue Service won't audit you to make sure you have purchased health insurance under provisions of the new health-care law . . . it may withhold your tax refund if you can't demonstrate that you are insured"²⁷⁶ While this measure may be effective for most Americans since they receive a federal refund sizeable enough to pay the penalty (\$695 per uninsured),²⁷⁷ it will not reach everyone—namely those individuals not entitled to an ample refund or any refund at all. For these individuals, compliance with the individual mandate will be largely voluntary. And the unpopularity of the individual mandate in Virginia may indicate that civil disobedience is forthcoming, a possibility that could cost the federal government.²⁷⁸

Of course, if the mandate penalty proves too difficult to enforce, congressional Democrats could always increase income taxes to fund the PPACA. But this alternative presumably was avoided in the 111th Congress because of the political unpopularity of raising taxes in a recession.

275. See PPACA, Pub. L. No. 111–48, § 1501(b), 124 Stat. 119, 242–49 (2010) (amended 2010) (to be codified as amended at 26 U.S.C. § 5000A).

276. Martin Vaughan, *IRS May Withhold Tax Refunds To Enforce Health-Care Law*, WALL ST. J., Apr. 15, 2010, <http://online.wsj.com/article/SB10001424052702304510004575186082454662468.html>.

277. *Id.*

278. The fact that five Democrat state senators voted for the Virginia Health Care Freedom Act indicates just how unpopular the federal mandate is with Virginians. See S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+vot+SP0143> (showing voting records of Virginia Senators on Senate Bill 417); 2010 SENATE OF VA., MEMBERSHIP MAILING LIST, *supra* note 123 (providing party affiliations); see also Rosalind S. Helderman, *Virginia Senate Bills Say No To Requiring Health Insurance*, WASH. POST, Feb. 2, 2010, at A1.

B. *Constitutional Amendment*

Under Article V of the U.S. Constitution, the states can call a convention for the purpose of proposing constitutional amendments.²⁷⁹ To succeed, any proposed amendment must be ratified by three-fourths of the states, which requires passage by both houses in thirty-eight state legislatures.²⁸⁰ Interest in calling a constitutional convention is growing in many states, but the overwhelming difficulty of amending the Constitution using this mechanism is daunting.²⁸¹ These odds did not stop the Virginia House of Delegates from considering a Joint Resolution during the 2010 Session to call just such a convention.²⁸² While the measure was left in the House Privileges and Elections Committee,²⁸³ it is meaningful that Virginia's representatives are even considering a convention—perhaps again signifying the dissatisfaction with current federal action generally and the individual mandate in particular.²⁸⁴ And even if a convention is never held, the call to do so from states like Virginia, Florida, South Carolina, and Rhode Island invariably places pressure on Washington.

C. *Congressional Amendment or Repeal*

The final hurdle for the PPACA is surviving the 2010 and 2012 congressional elections. Preliminary predictions indicate midterm losses for Democrats in both chambers of Congress, but the severity of those losses remains to be seen.²⁸⁵ By most accounts, howev-

279. U.S. CONST. art. V.

280. *Id.* Nebraska has a unicameral legislature, so ratification in that state requires approval of only one body. James M. LeMunyon, *A Constitutional Convention Can Rein In Washington*, WALL ST. J., Apr. 1, 2010, at A19.

281. For example, Florida Senate Bill 10 calls for a U.S. Constitutional Convention to address financial responsibility in the federal government, including health reform costs. S. Con. Res. 10, 2010 Leg., Reg. Sess. (Fla. 2010), 2010 Fla. Laws ____.

282. See H.J. Reg. 183, Va. Gen. Assembly (Reg. Sess. 2010).

283. H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2010), available at <http://leg1.state.va.us/cgi-bin/legp504exe?101+sum+HJ183>.

284. See LeMunyon, *supra* note 280.

285. See, e.g., *2010 Election Maps—Battle for the House*, REAL CLEAR POLITICS, http://www.realclearpolitics.com/epolls/2010/house/2010_elections_house_map.html (last visited Oct. 30, 2010) (forecasting 190 Democrat victories, 207 Republican victories, and 38 “Toss Ups”); *2010 Election Maps—Senate No Toss Ups*, REAL CLEAR POLITICS, http://www.realclearpolitics.com/epolls/2010/senate/2010_elections_senate_map_no_toss_ups.html (last visited Oct. 30, 2010) (forecasting 51 Democrat Senators and 49 Republican Senators).

er, it is possible for Republicans to reclaim majorities in both chambers this year.²⁸⁶ If this happens, repeal measures are sure to be introduced in Congress, and they are equally certain to be filibustered by Senate Democrats. The most significant obstacle a repeal bill would face is surely President Obama's veto power, which would require sixty-seven senate votes to overcome.²⁸⁷ As such, any 2010 shift in congressional power is unlikely to result in repeal, and the 2012 congressional and presidential races are uncertain at this time.

If the individual mandate is invalidated by the courts, however, a Republican Congress could prove instrumental to the downfall of the PPACA. In other words, if the mandate requires amendment to pass constitutional muster—as would be the case if found to be an unapportioned capitation tax, for example, then a 2010 shift in congressional power could ensure elimination of the mandate.

V. CONCLUSION

The individual mandate contained in the PPACA has provoked enormous opposition since its introduction in House Bill 3590. Immediately following the PPACA's passage into law, resistance was transferred from Congress to federal courthouses across the country. In addition, numerous state legislatures have mounted their own challenges by passing or introducing opposition laws. These state legislative actions, while not legally binding on Congress, invite disobedience and express profound discontent.

On the judicial front, procedural doctrine and substantive precedent remain formidable obstacles to relief. The outcomes of the Virginia and Liberty suits, like the others, are uncertain. If the challenges are successful, the entire PPACA is imperiled because GOP senators are not likely to support an alternate funding mechanism, as would be necessary to sustain the increased cost of

286. See *Battle for the House*, *supra* note 285; *Senate No Toss Ups*, *supra* note 285; see also *House Outlook for 2010*, 33 THE ROTHENBERG POL. REP., July 19, 2010, at 1.

287. See Jordan Fabian, *McCain: GOP Hopes To Sidestep Veto in Repeal Efforts*, THE HILL (Apr. 1, 2010, 10:44 AM), <http://thehill.com/blogs/blog-briefing-room/news/90201-mccain-gop-hopes-to-sidestep-veto-in-repeal-efforts> (analyzing Senator McCain's alternatives for overcoming Obama's veto power should the GOP win back majorities in both houses).

health insurance reform. In the end, while the PPACA is in place and moving forward, its ultimate success is still in limbo. State lawmakers and individual citizens continue to oppose what they see as an encroachment on individual liberty and states' rights, and these battles are likely to continue in the months and years to come.